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Supreme Court, U.S.
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No. ______

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In The
Supreme Court of the United States
October Term, 2000

RAYMOND JACKSON,
Petitioner

vs.

JANICE R. LACHANE, Director,
Office of Personnel Management Agency, et al,
Respondent(s).

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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182 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION I

I. Introductory Statement: The record shows that petitioner was denied the right to conduct discovery (99.F.R.D. 465, See Matter of Citizens Loan and Sav. Co., 621 F.2d 911, 913 (8th Cir. 1980); Nat. Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F. 2d 95 (4th Cir. 1983) and Cities Service, supra, 391 U.S. at 297-98, 88 S. Ct. at 596-97). This is a genuine issue of ultimate fact that a reasonable jury would be permitted to draw an inference adverse to respondents, the moving party (99 F.R.D. 465, see National Industries v. Republic Nat. Life Ins. Co., 677 F. 2d 1258, 1265 (9th Cir. 1982); Mutual Fund Investors v. Putnam Management Co., 533 F. 2d 620, 624 (9th Cir. 1977)). The grounds for respondents' motion to dismiss, or in the alternate summary judgment are completely pretextual. The specific facts that show that there are many prohibited Title VII and ADEA discrimination genuine issues for trial, as set forth in petitioner 5/8/97 EEOC charges, Appendix 98, and petitioner's 8/11/97 complaint in the case record. For example, given that Union States Army has known since 8/28/88 that petitioner's retirement was illegal, why did they not obey the law and return petitioner to his Operations Research Analyst position, annual salary, $38,753.00 per year? Given that United States Army Aviation Systems Command Headquarter's Civilian Personnel Officer knew that Operations Research Analyst Career Field (i.e., 1515 series) personnel were ineligible for early retirement under OPM authority 88-1, did she by the 12/30/87 memorandum (Subject: Employees Eligible for Retirement - Early Out Criteria) illegally or

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pretextually solicit petitioner for retirement? Given that the petitioner's complaint shows petitioner's 3/31/88 retirement is illegal and United States Army knew that on 8/28/88, and willfully and intentionally concealed that illegal retirement from petitioner from 3/31/88 to 3/6/97 (discovered from petitioner's 1/9/97 FOIA request), and that petitioner had been denied his 5 USC 7701 right to appeal for more than 12+ years (i.e., 3/31/88 to 6/30/2000), whether it is pretextual for the 11th Circuit and respondents to suggest that: (1) there are no Title VII and ADEA discrimination genuine issues for trial, Appendix 98, or (2) as the Eleventh Circuit concluded, at Appendix 14, "that Jackson's claims were either administratively unexhausted, not properly before the district court, or meritless", constitute a dispute over testimonial demeanor or credibility? or (3) Given that the complaint shows that respondents' misconduct and illegal behavior were clearly willful and intentional, whether punitive damages and back pay will be awarded petitioner if this constitutes a dispute over testimonial demeanor or credibility? Given that petitioner's complaint shows that Commander, United States Army Materiel Command 10/18/88 letter, paragraph 2, directed United States Army Aviation Systems Command Headquarter's Civilian Personnel Officer (CPO)" to send the original copy of OPM's 8/31/88 letter regularizing Mr. Jackson's retirement to Mr. Jackson" and CPO willfully and intentionally failed to comply with that order, for more than 12 years, does the CPO's actions perpetrate prohibited Title VII and ADEA discrimination upon petitioner if this constitutes a dispute over testimonial demeanor or credibility? These disputed fact issues must inevitably be decided (99 F.R.D. 465, see Angel v. Seattle First Nat. Bank, Supr Ct, 653 F. 2d at 1299-1300, Standard Oil Co. v. Dept. of Energy, Supra 596 F.2d at 1065; Securities and Exchange Com. v. Geyser Mineral Corp., 452 F.2d 876, 880 (10th Cir. 1971) are material and necessary to the outcome of this case (99 F.R.D. 465, see Angel v. Seattle First Nat. Bank, 653 F. 2d 1293 (9th Cir. 1981); Barker v. Norman, 651 F. 2d 1107, 1133 (5th Cir. 1981); Standard Oil Co. v. Dept. of Energy, 596 F.2d 1029, 1065 (Emp. App. 1978)).

II. Question I. Whether summary judgment for respondents, Appendix A, should be reversed due to respondents, including, United States Army (United States Army Aviation Systems Command (AVSCOM) Headquarters' Civilian Personnel Officer (CPO)), intentionally and willfully: (1) concealing for more than 11+ years that petitioner's March 31, 1988 retirement is illegal after discovering it on August 28, 1988, an evidentiary dispute or a dispute over testimonial demeanor or credibility; (2) failing for more than 11+ years to provide petitioner the original copy of Office of Personnel Management (OPM)'s 8/31/88 letter regularizing Mr. Jackson's retirement after being directed "to send Mr. Jackson the original copy of OPM's 8/31/88 letter" by Commander, United States Army Materiel Command, on October 18, 1988 (see petitioner's complaint), is an evidentiary dispute or a dispute over testimonial demeanor or credibility; (3) perpetrating pretexts and concealment of evidence to keep this Black petitioner from returning from an illegal 3/31/88 retirement to the work force of United

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States Army Aviation Systems Command Headquarters, is an evidentiary dispute or a dispute over testimonial demeanor or credibility; (4) perpetrating prohibited retaliation, age (54), race (Black) and sex (male) discrimination upon petitioner for participating in the federally protected activity of filing several Equal Employment Opportunity (EEO) complaints related to promotion and Suggestions, during July 1985 to March 1988 is an evidentiary dispute or a dispute over testimonial demeanor or credibility; (5) respondents failing to answer admissions for the Title VII and ADEA charges in the complaint and the 5/8/97 EEOC petition, Appendix 98, causing all allegations to be ADMITTED and the LAW OF THE CASE to apply is an evidentiary dispute or a dispute over testimonial demeanor or credibility; (6) soliciting an Operations Research Analyst, who is ineligible for retirement, to retire, is an evidentiary dispute or a dispute over testimonial demeanor or credibility; (7) respondents' attorney perpetrating misconduct upon petitioner by denying petitioner right to file an Eleventh Circuit Reply Brief, is an evidentiary dispute or a dispute over testimonial demeanor or credibility; (8) MSPB denying petitioner's right to have his charges of prohibited retaliation, age, race (Black and sex (male) discrimination, Appendix 98, against OPM from being investigated, is an evidentiary dispute or a dispute over testimonial demeanor or credibility and has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's supervisory power to protect petitioner's Fifth Amendment Constitutional rights, Appendix 22?

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QUESTION II

I. Introductory Statement: Kenneth E. Vines, appellees' counsel and Assistant United States attorney, delivered appellees' brief, dated March 31, 1999, to petitioner on April 27, 1999, eight (8) days after the due date (4/19/99) of petitioner's Reply Brief had passed, which is prohibited, retaliation, age (66), race (Black) and sex (male) discrimination, perpetrated against petitioner for participating in the appellate process, a protected activity. The 11th Circuit denied petitioner's Motion to file an out of time (late) Reply Brief.

II. Question #2. Whether the United States Court of Appeals for the Eleventh Circuit's December 28, 1999 Decision, Appendix A, which affirmed United States District Court's October 9, 1999 Decision, Appendix D, is unconstitutional and infringes upon petitioner's Fifth Amendment constitutional rights, Appendix 22.

QUESTION III

I. Introductory Statement: On April 13, 1998, petitioner filed a Motion for Joinder of persons needed for just adjudication, namely, Ben L. Erdreich, Chairman, Merit Systems Protection Board, as required by 5 USC 7703(b)(2), Appendix 88; as petitioned to EEOC, Appendix 98 and as permitted by the Equal Opportunity Commission's Right to File a Civil Action (W1092) letter, dated July 7, 1997, Appendix 43 and 29 CFR 1614.310, Appendix 72. On September 24, 1998, United States District Court, in its order and recommendation of the Magistrate Judge, Appendices A and 38, failed to grant or deny petitioner's Motion for Joinder of Persons Needed for Just Adjudication, which is a prejudicial error (Erskine v. Upham, 56 Cal.

App. 2d 235, 132 P. 2d 219, 228 and State v. Gilcrist, 15 Wash. App. 892, 552 P. 2d 690, 693), pretextual and denial of due process of law.

II. Question #3: Whether the United States Court of Appeals for the Eleventh Circuit's December 28, 1999 Decision, Appendix A, which Affirmed the United States District Court's September 24, 1998 Decision, Appendix D, to not Grant or Deny Petitioner's April 13, 1998 Motion for Joinder of Necessary Persons needed for Just Adjudication, namely, Ben L. Erdreich, Chairman, Merit Systems Protection Board, has so far Departed from the accepted and Usual Course of Judicial Proceedings, as to call for an Exercise of this Court's Supervisory Power to Protect Petitioner's Fifth Amendment Constitutional Rights, Appendix 22.

QUESTION IV

I. Introductory Statement: On March 31, 1988, the United States Army Aviation Systems Command Headquarters St. Louis, Missouri illegally retired petitioner, GS-1515-12, Step 6 Operations Research Analyst, under the retirement authority for firefighters and law enforcement officers, 5 USC 8336(c)(2) and (f), Appendix 96, concealing the illegal retirement from 3/31/88 to 3/6/97, Appendix 97, failing to notify petition of his statutory right to appeal the illegal retirement under 5 USC 7701(a), Appendix 68, and failing to return him to duty after the 8/28/88 discovery, Appendix 116, of the illegal retirement, which is prohibited retaliation, age (54), race (Black) and sex (male) discrimination perpetrated against the petitioner for the 1985 to 1988 filing of Equal Employment Opportunity (EEO) complaints, a protected activity. Petitioner's 2/24/98 Motion to Compel defendants to comply with statutory directives, to declare plaintiff's illegal, involuntary and unauthorized retirement a nullity, and reinstate plaintiff, effective 4/1/88, was denied by United States District Court, on September 24, 1998.

II. Question #4: Whether the United States Court of Appeals for the Eleventh Circuit's December 28, 1999 Decision, Appendix A, which affirmed United States District Court's September 24, 1998 decision to deny petitioner's relief for the 3/31/88 concealed, illegal, 5 USC 8336(c)(2) and (f), Appendix 96, retirement is unconstitutional and infringes upon petitioner's Fifth Amendment constitutional rights, Appendix 22.

QUESTION V

I. Introductory Statement: OPM admitted an administrative error relative to the seven (7) percent deposit for all post-1956 active military service on October 3, 1996 and reissued its decision on October 21, 1996, Appendix 117. Petitioner appealed that decision to United States Court of Appeals for the Federal Circuit, Appendix 52. U.S. Court of Appeals for the Federal Circuit affirmed OPM's decision on or about 10 December 1997, App. 52. On 12/15/97 plaintiff filed application to make deposit or deposit or redeposit civil service retirement system (SF 2803) with OPM as authorized by 5 USC 8334(j)(1)(A), Appendix 119. OPM has contumaciously failed to process the application for more than two (2) years, which is prohibited retaliation, age (63), race (Black) and sex (male) discrimination perpetrated against the petitioner for appealing OPM's decision, Appendix 117, a protected activity. On 2/17/98, plaintiff filed a

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motion to compel OPM to process petitioner's timely application to make deposit or redeposit Civil Service retirement system (SF2803) in U.S. District Court, which denied the motion on September 24, 1998.

II. Question #5. Whether United States Court of Appeals for the Eleventh Circuit's December 28, 1999 Decision, Appendix A, which affirmed United States District Court's 10/9/98 and September 24, 1998 decision to deny petitioner's Motion to compel OPM to comply with 5 USC 8334(j)(1)(A), Appendix 119, and process petitioner's timely application to make deposit or redeposit civil service retirement system (SF 2803), has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court supervisory power to protect petitioner's Fifth Amendment constitutional rights, Appendix 22

QUESTION VI

I. Introductory Statement: The Equal Employment Opportunity Commission (EEOC)'s Decision letter, page 1, second and third paragraphs, Appendix 43, states that: "petitioner has filed the instant petition with the Commission seeking review of the Board's finding of no discrimination. In addition, the record indicates that petitioner filed a civil action in the United States Court of Appeals for the Federal Circuit (Civil Action No. 97-3331), seeking review of the Board's Order affirming the Initial Decision. Further, the Commission was informed that as of June 20, 1997, the civil action remains pending.

When a civil action is filed raising the same claim(s) adjudicated by the Board, the Commission will cease processing petitioner's petition for review.

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Accordingly, EEOC petition No. 03970105 is hereby dismissed. See Hickman v. US. Postal Service, EEOC Petition No. 03930015 (March 10, 1993)."

Petitioner appealed (i.e., Resort to a superior (i.e., appellate) court to review the decision of an administrative agency, see Black's Law Dictionary, Sixth Edition) that portion of the 3/11/97 Merit Systems Protection Board (MSPB) Decision, Appendix 55, which affirmed OPM's 10/21/96 decision, Appendix 117, to United States Court of Appeals for the Federal Circuit. See Appendices 45 and 52. The 12/10/97 United States Court of Appeals for the Federal Circuit's decision affirmed that portion of MSPB's decision, Appendix 52.

Petitioner petitioned (i.e., a formal written request addressed to some governmental authority. See Black's Law Dictionary, Sixth Edition), that portion of the 3/11/97 Merit Systems Protection Board (MSPB)'s decision, Appendix 55, which failed to investigate and rejected the prohibited retaliation, age (63), race (Black) and sex (male) discrimination issues to EEOC, Appendix 98. The EEOC's decision appears in Appendix at Appendix 43.

The United States Court of Appeals for the Federal Circuit is an appellate court (i.e., a court having jurisdiction of appeal and review; a court to which causes are removable by appeal, certiorari, error or report. A reviewing court, not a "trial court" or court of first instance. See Black's Law Dictionary, Sixth Edition) and 28 USC 41, which show that the United States Court of Appeals for the Federal Circuits is composed of all Federal judicial districts. Consequently, EEOC's allegation that petitioner's

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5/21/97 appeal to United States Court of Appeals for the Federal Circuit, Appendix 45, was a "civil action", not an appeal, is "a prejudicial error" substantially affecting petitioner's legal rights and obligations. Erskine v. Upham, 56 Cal. App. 2d 235, 132 p. 2d 219, 228.

II. Question 6: Whether the United States Court of Appeals for the Eleventh Circuit's December 28, 1999 Decision, Appendix A, the United States District Court's October 9, 1998 Decision, Appendix D or United States Equal Employment Commission's July 7, 1997 Decision and dismissal, Appendix 43, perpetrated a prejudicial error (i.e., error substantially affecting petitioner's legal rights and obligations. Erskine v. Upham, 56 Cal. App. 2d 235, 132p. 2d 219, 228) upon petitioner, which is unconstitutional and has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's supervisory power to protect petitioner's Fifth Amendment Constitutional Rights, Appendix 22.

QUESTION VII

I. Introductory Statement: The petitioner timely filed age discrimination charges on 5/8/97 with the Equal Employment Opportunity Commission (EEOC), Appendix 98, and in the 8/11/97 complaint with the United States District Court for the Middle District of Alabama, under authority of EEOC's 7/7/97 right to file a civil action, Appendix 43, received on 7/14/97, and under provisions of 5 USC 633a(c) civil actions; jurisdiction; relief, which states that "any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purpose of this chapter", Appendix 85. The 9/24/98 order and Recommendation of Magistrate Judge, Appendix 38, clearly shows that United States District Court dismissed petitioner's age discrimination case, intentionally and willfully perpetrated by the respondents, without hearing the prima facie case, as required and mandated by 42 USC 2000e-5(f)(4) and (f)(5), Appendix 124 and FRCP 56(c) and (d), 125 Appendix 12-+. Clearly, petitioner has a statutory right and constitutional Fifth Amendment (due process) right to an ADEA hearing. When the constitution requires a hearing it requires a fair one, held before a tribunal which meets currently prevailing standards of impartiality (Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950)). Petitioner did not receive an ADEA hearing nor a Title VII hearing. The United States District Court affirmed the 9/24/98 order and recommendation of Magistrate on 10/9/98, Appendix D. The Eleventh Circuit affirmed United States District Court's 10/9/98 decision on 12/28/99, Appendix A, and failed to provide petitioner the appropriate legal or equitable relief authorized by P.L. 90-202; 81 Stat. 602, Section 7(b), Appendix 127. Petitioner requested relief for the Title VII and ADEA cases, as of 6/20/98, is at USDC docket #62 and exceeds $128,768,170.

II. Question VII. Whether United States Court of Appeals for the Eleventh Circuit's December 28, 1999, Decision, Appendix A, which affirmed United States District Court's 10/9/98 decision, Appendix D, to not conduct the statutorily required ADEA hearing or Title VII hearing, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's supervisory power to protect petitioner's Fifth Amendment Constitutional rights, Appendix 22.

QUESTION VIII

I. Introductory Statement. The United States District Court's 10/9/98 decision, Appendix D, granted respondents' motion to dismiss, or in the alternative, for summary judgment. The United States Court of Appeals for the Eleventh Circuit's 12/28/99 decision, Appendix A, affirmed United States District Court's 10/9/98 decision, Appendix D, for summary judgment.

Petitioner's complaint and 5/8/97 EEOC charges, App. 98, evidence, including concealment of the 3/31/88 illegal retirement for more than 11 years, clearly established that intentional and continuous racial animus, which was perpetrated against petitioner since 8/28/88, had at least partly motivated the contested Title VII and ADEA discrimination employment actions and those contested actions would not have occurred had employee been white (Brown v. East Mississippi Elec. Power Ass'n, C.A. 5 (Miss.) 1993, 989 F. 2d 858, rehearing denied 995 F. 2d 225). Additionally, respondents' counsel, Kenneth E. Vines, willfully, intentionally and contumaciously disobeyed United States District Court's 4/1/98 Scheduling Order (docket entry #46) by willfully, intentionally and contumaciously failing and refusing to attend the court ordered face-to-face settlement conference set for 6/24/98 by notice dated 5/20/98 (docket entry #56). Petitioner's claim and liquidated damages exceeds $128,768,170, as of 6/20/98 (docket entry number 62).

II. Question 8: Whether, in the interests of judicial economy, and the fact that petitioner's ADEA and Title VII claims exceeds $128,768,170 (see USDC's docket entry #62), the Supreme Court should reverse summary judgments for respondents in these Title VII and ADEA employment discrimination cases and render judgment for petitioner to immediately restore and preserve petitioner's Fifth Amendment Constitutional rights, Appendix 22, Since petitioner has demonstrated prima facie Title VII and ADEA cases at 8/11/97 complaint and 5/8/97 EEOC charges, Appendix 98?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Ben L. Erdreich, Chairman, Merit Systems Protection Board (MSPB), Appendix 98 and 5 USC 7703(b)(2), Appendix 88.

James B. King, former Director, Office of Personnel Management Agency.

Janice R. Lachane, Current Director, Office of Personnel Management Agency (Authority: FRAP 43(c)), Appendix 60.

United States of America

Togo D. West, Jr., former Secretary of the Army

Louis Caldera, Current Secretary of the Army (Authority: FRAP43(c)), Appendix 60.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Raymond Jackson, respectfully prays that a writ of certiorari issue to review the Decision and Judgment of the United States Court of Appeals for the Eleventh Circuit, entered on December 28, 1999 and March 03, 2000.

OPINIONS BELOW

The Decision of the Court of Appeals for the Eleventh Circuit is reprinted in Appendix A. The Judgment of the Court of Appeals for the Eleventh Circuit is reprinted at Appendix B. They are reported at 205 F. 3d 1354 (11th Cir. 1999), Appendix 42. The Rehearing order of the Court of Appeals for the Eleventh Circuit is reprinted at Appendix C. The Order of the United States District Court for the Middle District of Alabama is reprinted at Appendix D.

The initial Decision of United States of America Merit Systems Protection Board, Atlanta Regional Office, Docket Number #AT-0831-97-206-I-1, Raymond Jackson, Appellant v. Office of Personnel Management, Agency (CSA 3059121), dated March 11, 1997 is reprinted at Appendix 55.

The Decision of United States Equal Employment Opportunity Commission to Petition No. 03970105/MSPB No. AT-0831-97-0206-I-1, Raymond Jackson, v. James B. King, Director, Office of Personnel Management, Agency, dated July 7, 1997 is reprinted at Appendix 43. Petitioner Raymond Jackson's letter to United States Equal Employment Opportunity Commission, dated October 28, 1998, requesting EEOC to correct an administrative error in its July 7, 1997 decision, at Appendix 43, is at Appendix 47.

The judgment of United States Court of Appeals for the Federal Circuit Case No. 97-3331, on Appeal from the Merit Systems Protection Board in Case No. AT 0831970206-I-1, Raymond Jackson, Petitioner v. Office of Personnel Management, Respondent, a case which involved the application for benefits in the Office of Personnel Management (reprinted at Appendix 52), dated December 10, 1997, is reprinted at Appendix 52.

JURISDICTION

The petitioner appealed the Office of Personnel Management's decision, Appendix 117, and the prohibited age (63), race (Black) and sex (male) discrimination issues and retaliation for participating in the protected activity of filing Equal Employment Opportunity (EEO) complaints to the Merit Systems Protection Board, Atlanta Regional Office, under 5 USC 7701, Appendix 68 and 5 USC 7703, Appendix 88.

The Administrative Law Judge of the Merit Systems Protection Board (MSPB) affirmed Office of Personnel Management's decision, Appendix 117, and refused to investigate and rejected petitioner's prohibited age (63), race (Black) and sex (male) discrimination or the retaliation issue perpetrated by OPM (see Appendices 55 and 98), as required by Public Law 95-454, 5 USC 2302(c), Appendix 120 and 29 CFR Ch. XIV (7/1/99 Edition) 1614.108(a), which states that "The investigations of complaints shall be conducted by the agency against which the complaint has been filed." and 5 CFR 1201.156, Appendix 122.

The petitioner appealed the OPM's Decision, Appendix 117, which was affirmed by the Administrative Law Judge of MSPB, Appendix 55, to the United States Court of Appeals for the Federal Circuit, Appendix 45. That Court affirmed MSPB's decision, Appendix 52.

The petitioner appealed the prohibited retaliation, race (Black), sex (male) and age (62) discrimination issues of MSPB's decision, Appendix 98, to the Office of Federal Operations, Equal Employment Opportunity Commission (EEOC) (see Appendix 98) under 29 CFR 1614.303, Appendix 120; 29 CFR 1614.304, Appendix 121; 5 USC 7702(b)(1), Appendix 62, and 5 USC 7703(b)(2), Appendix 88. The EEOC issued its Decision, Appendix 43, including Right to File a Civil Action under 29 CFR 1614.310, Appendix 72.

The date on which the United States Court of Appeals for the Eleventh Circuit decided my case was December 28, 1999. A copy of the decision appears at Appendix A. A timely petition for rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on February 22, 2000. A copy of the order denying rehearing appears at Appendix C. The date on which United States Court of Appeals for the Eleventh Circuit issued the judgment in my case was March 03, 2000. A copy of the judgment appears at Appendix B. The date on which the United States District Court for the Middle District of Alabama decided my case was October 9, 1998. A copy of that decision appears at Appendix D. Federal Court has subject matter jurisdiction over suits brought under Title VII and ADEA. Yellow Freight System v. Donnelly, 494 U.S. 820, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990).

The Court of Appeals for the Eleventh Circuit had jurisdiction to review the final decision of United States District Court, Appendix D, under 28 USC 1291 and 28 USC 1294(1). The Supreme Court has jurisdiction to review the Eleventh Circuit's decision, Appendix A, under 28 USC 1254(1).

CONSTITUTIONAL AMENDMENTS, STATUTES AND REGULATIONS INVOLVED

The provisions of FRAP 25 and FRAP 31 are reproduced in the Appendix at App. 16 and App. 17. The provisions of FRCP 12 and Fifth Amendment of United States Constitution are reproduced in the Appendix at App. 18 and App. 22. The provisions of 29 CFR 1614.201 and 5 CFR 831.2101 to 831.2107 are reproduced in the Appendix at App. 22 and App. 23. The provisions of FRAP 43 and Supreme Court Rule 35 are reproduced in the Appendix at App. 60 and 61. The provisions of 5 USC 7702 and FRAP 34 are reproduced in the Appendix at App. 62 and App. 66. The provisions of FRAP 19 and FRCP 21 are reproduced in the Appendix at App. 66 and App. 67 The provisions of 5 USC 7701 and 29 CFR 1614.310 are reproduced in the Appendix at App. 68 and App. 72. The provisions of 29 USC 206 and 42 USC 2000e-16 are reproduced in the Appendix at App. 74 and App. 79. The provisions of 29 USC 791 and 29 USC 633a are reproduced in the Appendix at App. 82 and App. 85. The provisions of the 11th Circuit Rule 36-2 and 5 USC 7703 are reproduced in the Appendix at App. 88 and App. 88. The provisions of the Seventh Amendment to United States Constitution and 29 USC 631 are reproduced in the Appendix at App. 89 and App. 90. The provisions of 11th Circuit Rule 34-3 and 11th Circuit Decisions without Published Opinions are reproduced in the Appendix at App. 91 and App. 93. The provisions of the 11th Circuit Rule 36-1 are reproduced in the Appendix at App. 96. The provisions of 5 USC 8336(c)(2) and (f) and 5 USC 8334(j)(1)(A) are reproduced in the Appendix at App. 96 and App. 119. The provisions of Public Law 95-454, 5 USC 2302(c) and 5 CFR 1614.303 are reproduced in the Appendix at App. 120 and App. 120. The provisions of 5 CFR 1614.304, 5 CFR 1201.156 and 5 CFR

1201.157 are reproduced in the Appendix at App. 121-App. 123. The provisions of PL 89-554, 5 USC 706 are reproduced in the Appendix at App. 123. The provisions of 29 CFR, 1601.28(d), 42 foll. USCA 2000e-4 are reproduced in the Appendix at App. 124. The provisions of 42 USC 2000e-5(f)(4) and (f)(5) are reproduced in the Appendix at App. 124. The provisions of FRCP 56(a), (b), (c), and (d) are reproduced in Appendix at App. 125. The provisions of P.L. 90-202; 81 Stat. 602, Section 2 are reproduced in the Appendix at App. 126. The provisions of P.L. 90-202; 81 Stat. 602, Section 4(a) are reproduced in the Appendix at App. 126. The provisions of P.L. 90-202; 81 Stat. 602, Section 7(b) and (c) are reproduced in the Appendix at App. 127 The provisions of Amendment I to the Constitution of the United States is reproduced in the Appendix at APP. 128. The provisions of FRAP 28 and 42 USC 2000e-5 are in the Appendix at APP. 27 and APP. 30.

STATEMENT OF THE CASE

The United States Court of Appeals for the Eleventh Circuit's, December 28, 1999 decision is at Appendix A. Plaintiff-appellant totally, completely, and absolutely disagrees with the 11th Circuit's decision, Appendix A, because it is not based on law or facts. It is pretextual and should be based on law of the case, because respondents failed to answer, admit to or reject petitioner's request for admissions within the time limit set by United States District Court 4/1/98 Scheduling Order (Docket entry #46), July 16, 1998. Consequently, respondents have admitted to all of petitioner's request for admissions plus all of the charges OF 8-11-97 5/8/97, Appendix 98.

In view of the United States Court of Appeals for the 11th Circuit's decision, to deny plaintiff-appellant's appeal, the plaintiff-appellant: (1) challenge the CONSTITUTIONALITY of each United States Code (USC), United States Code Annotated (USCA), Amendment to United States Constitution, Code of Federal Regulation (CFR), Federal Rules of Appellate Procedure (FRAP), Federal Rule of Civil Procedure (FRCP), case, and 11th Circuit Rule, which plaintiff-appellant cited in each pleading of USCA Docket Number #98-6992 and USDC Docket #97-01223 CN-D-N, including, but not limited to FRAP 5(d), 38, 38(a), 25, 27, 28(c), 31(a)(1) and 31(c); 18 USCA 401, 1621, 3282, 1001, 1018, 402, and 3285; 42 USCA 2000h; 67 CJS 29; 1st, 5th, 7th, 9th, and 14th Amendments of United States Constitution; 11th Cir. R. 31(a); Memorandum to Counsel, dated May 4, 1999; each United States District Court's order issued; each 11th Circuit Order issued; each case, regulation, statute, and amendment to U.S. Constitution cited in plaintiff's brief, dated 2/26/99; each regulation, statute, FRAP, Amendment to U.S. Constitution, OPM Auth. 88-1, 5 USC 8336(c)(2) and (f) and Title VII, Civil Rights Act of 1964 for Employment Discrimination and all ADEA laws, cited in Reply Brief of plaintiff, dated 5/20/99, and (2) pursuant to Rules 39, 40 40(a) and 41 of the Federal Rules of Appellate Procedure and Memorandum to Counsel or Parties, dated December 28, 1999, plaintiff-appellant petitions and seeks review of the United States Court of Appeals for the Eleventh Circuit's December 28, 1999 decision, Appendix A, on grounds set forth below:

I. The United States Court of Appeals for the Eleventh Circuit's December 28, 1999 decision, appendix A, is unconstitutional. The 11th Circuit's decision, Appendix A is unconstitutional because plaintiff-appellant was denied his constitutional right to file the REPLY BRIEF FOR APPELLANT, dated May 20, 1999, in response to the BRIEF OF APPELLEE(S), dated March 31, 1999. The events which resulted in the denial of plaintiff's appellant's constitutional right to file a Reply Brief in response to the Brief of Appellee(s) are:

(a) the defendants-appellees' attorney, Kenneth E. Vines, willfully, knowingly, illegally, maliciously, arbitrarily and capriciously failed to deliver the Brief of Appellee(s) to plaintiff-appellant at his address of record, Raymond Jackson, 2980 Juniper

Street, Fairfield, California 94533, as falsely and fraudulently stated on the Certificate of Service to Brief of Appellee(s), until April 27, 1999 (see plaintiff's pleadings: Motion (petition) for show cause order to Require Kenneth E. Vines, Defendants-Appellees' Counsel, Show Cause Why Constructive Civil Contempt Proceedings and Direct Criminal Contempt Proceedings Should Not Be Initiated Against him for Disobeying and Violating Federal Rules of Appellate Procedures, United States Codes Annotated, and Fifth Amendment of United States Constitution, In United States Court of Appeals for the Eleventh Circuit, dated September 28, 1999; Plaintiff's appellant's Motion to Declare Appellees' Brief in Response to Principal Brief for Appellant untimely dated April 16, 1999; and plaintiff's appellant's Motion for Reconsideration of November 17, 1999 Order to Deny Motion (petition) for Cause Order to Require Kenneth E. Vines, Defendants-Appellees' Counsel, Show Cause Why Constructive Civil Contempt Proceedings and Direct Criminal Contempt Proceedings should not be initiated against him for disobeying and violating Federal Rules of Appellate Procedure, United States Codes Annotated, Fifth Amendment-United States Constitution, In United States Court of Appeals for the Eleventh Circuit, dated September 28, 1999, dated November 26, 1999), which were 24 days, after the April 3, 1999 delivery due date for Brief of Appellee(s) and 8 days after the April 19, 1999 due date for Reply Brief for Appellant, dated May 20, 1999, had EXPIRED, causing Reply Brief for Appellant, to be 30 days late and

(b) the United States Court of Appeals for the Eleventh Circuit arbitrarily and capriciously ABUSED ITS

DISCRETION, on July 14, 1999, by DENYING PLAINTIFF'S-APPELLANT'S MOTION TO FILE A REPLY BRIEF OUT OF TIME, dated May 20, 1999. The 11th Circuit's decision, Appendix A, is a denial of due process of law and unconstitutional. It is unconstitutional because it violates both the 1st and 5th amendments of United States Constitution, Appendices 127 and 22. Therefore the 11th Circuit's decision, Appendix A, should be reversed.

II. The United States Court of Appeals for the Eleventh Circuit's decision, Appendix A, is unconstitutional due to the Court's arbitrary and capricious failure to grant or deny plaintiff-appellant's Motion to Declare Appellee Brief Untimely, dated April 16, 1999, which denied plaintiff-appellant's due process of law, a Fifth Amendment-US Constitution Right (i.e., "not to be deprived of life, liberty or property without due process of law"), Appendix 22. Plaintiff-appellant's pleadings dated 9/28/99 and 11/26/99, clearly shows that 24 days untimely delivery of Brief of Appellee, dated March 31, 1999, to plaintiff-appellant at 2980 Juniper Street, Fairfield, California 94533 on April 27, 1999, CAUSED Reply Brief for Appellant, dated May 20, 1999, to be untimely for its April 19, 1999 due date by 31 days. The untimely delivery of Brief of Appellee is a denial of due process of law and unconstitutional. Therefore, the 11th Circuit's decision, Appendix A, should be reversed.

III. Plaintiff-appellant appealed 46 issues to United States Court of Appeals for the Eleventh Circuit to determine "whether the district court abused its discretion". (see plaintiff-appellant's Principal Brief Statement of the Issues, pages 2 to 8 and Statement of the Standard or Scope of Review for each contention, pages 13 to 15). The United States Court of Appeals for the Eleventh Circuit's 12/28/99 decision, Appendix A, failed to specify which of the 46 issues "the district court abused its discretion" and which of the 46 issues "the district court did not abuse its discretion". Clearly, plaintiff-appellant was DENIED DUE PROCESS of law. The denial of due process of law violates plaintiff-appellant's Fifth Amendment Right (i.e., "not to be deprived of life, liberty or property, without due process of law".), Appendix 22. Consequently, The 11th Circuit's 12/28/99 DECISION IS UNCONSTITUTIONAL. Therefore, it should be reversed.

IV. United States Army illegally retired plaintiff-appellant from his civil service GS-1515-12, Step 6 Operations Research Analyst position on March 31, 1988, under authority of 5 USC 8336(c)(2) and (f), Appendix 96, retirement authority for firefighters, law enforcement officers and personnel at least 62 (3/31/88 petitioner was age 54), which exceeded United States Army's statutory authority (see the appeal on Complaint, exhibit B, page 7). United States Army owes plaintiff-appellant the statutory duty to not illegally retire him under 5 USC 8336(c)(2) and (f), Appendix 96, or any law, which exceeds its statutory authority. United States Army failed to discharge that statutory duty. The United States Army's failure to discharge the cited statutory duty is a DENIAL OF DUE PROCESS OF LAW. The denial of due process of law is unconstitutional. It violates plaintiff-appellant's Fifth Amendment right (i.e., "not to be deprived of life, liberty or property, without due process.), Appendix 22. Therefore, plaintiff-appellant has a legal and constitutional right to be returned to his civil service position, effective, April 1, 1988. United States district court has jurisdiction of that type of employment discrimination (see Appendix 98), by virtue of US. Equal Employment Opportunity Commission's Right to Sue letter (i.e., Right to File a Civil Action (W1092)), dated July 7, 1997) and received 7/14/97 (see Appendix 43; Complaint, exhibit C, page 2))). Clearly, U.S. District Court erred and 11th Circuit's decision, Appendix A, should be reversed. Clearly, United States District Court's dismissal of the case (i.e., USDC Docket Number: 97-01223 CN-D-N) and the

11th Circuit's decision, Appendices A and D are unconstitutional. Therefore, they should be reversed.

V. U.S. Equal Employment Opportunity Commission's Right to Sue letter (i.e., Right to File A Civil Action (W1092)), dated July 7, 1997 (see Appendix 43), page 2, lines 2 to 10) states that "you have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, within thirty (30) calendar days of the date that you receive this decision. If you file a civil action, YOU MUST NAME AS DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court". U.S. District Court dismissed the case.

Clearly, Ben L. Erdreich, chairman of MSPB is required as a party for just adjudication because he failed to investigate employment discrimination perpetrated against plaintiff-appellant by OPM, Appendix 98, and to prevent dismissal of the case. Therefore U.S. District Court's order denying Motion for Joinder of Persons (i.e., Ben L. Erdreich, Chairman of MSPB) needed for just adjudication (4/13/98) is a Denial of Due Process of Law. The denial of due process of law is unconstitutional and violates plaintiff-appellant's Fifth Amendment Right (i.e., "not to be deprived of life, liberty or property, without due process of law"), Appendix 22. Therefore, U.S. District Court's order, Appendix D, and 11th Circuit's decision, Appendix A, should be reversed.

VI. The Reply Brief for Appellant, dated May 20, 1999, shows that plaintiff-appellant's statutory right to exhaust administrative remedies were denied and violated by government agencies more than eight (8) times, as set forth below:

Agencies/Type Denial of Right to Exhaust Administrative

Remedies

A. United States Army/Eight (8) years denial of plaintiff-appellant's Right to Appeal the unjustified personnel action of 12/30/87 illegally soliciting plaintiff-appellant for (see early retirement to Merit Systems Protection Board or EEOC, due to eight (8) years (i.e., 3/31/88 to 3/6/97), Appendix 97, of wrongful concealment of the illegal retirement of United States Army and Office of Personnel Management (OPM). United States Army's action constitutes both a denial of due process of law and a denial of plaintiff's right to exhaust administrative remedies. Therefore, the 11th Circuit's decision, Appendix A, should be reversed.

B. United States Army/Eight (8) years denial of plaintiff-appellant's Right to Appeal the unjustified personnel action-the 3/31/88 illegal retirement of plaintiff-appellant of his appeal rights to the Merit Systems Protection Board or EEOC, due to eight (8) years (i.e., 3/31/88 to 3/6/97), Appendix 97 of wrongful concealment of the illegal retirement by United States Army and Office of Personnel Management (OPM) see Appendix 97 and the Complaint. Clearly, United States Army denied plaintiff appellant due process of law and the statutory right to exhaust administrative remedies for more than eight (8) years. Therefore, U.S. District Court's dismissal and 11th Circuit's decision, Appendices A and D, should be reversed.

C. James B. King, former Director, Office of Personnel Management/Failed to perform statutory duty to answer Mr. Jackson's 1/11/96 (R1-1) letter prior to reducing his monthly Civil Service annuity from $1967.00 to $1096.00, denying plaintiff-appellant's Right to exhaust administrative remedies, due process of law, and statutory appeal rights under 5 USCA 7701(a) (see Appendix 68).

OPM's action is employment discrimination and unconstitutional. Therefore, 11th Circuit's decision, Appendix A, should be reversed.

D. Atlanta's Merit Systems Protection Board-Case No. ATO831-970206-1-I failed to investigate race (Black) discrimination, retaliation, and disparate treatment perpetrated upon Mr. Jackson by the Office of Personnel Management (see Appendix 97. Therefore MSPB's decision, U.S. District Court's dismissal and 11th Circuit's decision, Appendices A and D, are employment discrimination and unconstitutional and should be reversed.

E. Administrative Law Judge Margaret S. Cunningham, MSPB's 4/15/97 final decision-Case No. ATO 831-970206-I-1 failed to notify Mr. Jackson of his statutory right to appeal that 4/15/97 final decision to Equal Employment Opportunity Commission (EEOC) (see Appendix 55). MSPB's action is employment discrimination and unconstitutional, Appendix 98. Therefore, 11th Circuit's decision, Appendix A, should be reversed.

F. United States Army and MSPB not only failed to answer plaintiff-appellant's judicial complaint, see USDC Docket, but statutorily defaulted. United States Army and MSPB have defaulted and denied plaintiff-appellant due process of law, as well as the Title VII and ADEA relief petitioner set forth at United States District Court's docket entry 62, on 6/26/98. Therefore, the 11th Circuit's decision, Appendix A, is unconstitutional and should be reversed.

G. Office of Personnel Management failed to release plaintiff-appellant's 1/9/97 FOIA request until 2/18/97, and 3/6/97, see Appendix 97, until 29 days and 43 days after the MSPB's Law Judge closed MSPB case No. AT-0831970206-I-1 on

2/3/97, which denied Mr. Jackson's statutory rights 5 USCA 7701(a)) to appeal his illegal 3/31/88 retirement at both Atlanta's MSPB Case No. AT-0831970206-I-1, from 11/23/96 to 2/3/97, and United States Court of Appeals for the Federal Circuit/Case #97-3331 on 5/21/97, Appendix 45, by concealing (i.e., from 3/31/88 to 3/6/97) the illegal 3/31/88 retirement and withholding release of plaintiff-appellant's 1/9/97 FOIA request, Appendix 97. OPM's failure to comply with the FOIA statutory 10 day response time of 5 USC 552(a)(6)(A)(i) is employment discrimination, a denial of due process of law and plaintiff-appellant right to exhaust administrative remedies, as well as the Title VII and ADEA relief petitioners set forth at United States District Court's docket entry 62 on 6/26/98. Therefore, U.S. District Court's dismissal and the 11th Circuit's decision, Appendices A and D, should be reversed.

H. OPM and United States Army illegally concealed plaintiff-appellant's illegal 3/31/88 retirement, denying plaintiff-appellant due process of law and statutory rights to exhaust administrative remedies and appeal the 5 USC 8336(c)(2) and (f) violation from March 31, 1988 to March 6, 1997, Appendix 97, more than eight (8) years, as well as the Title VII and ADEA relief petitioners set forth at United States District Court's docket entry 62 on 6/26/98. The denial of due process of law and statutory rights to exhaust administrative remedies is employment discrimination and unconstitutional. Therefore, the 11th Circuit's decision, Appendix A, should be reversed.

I. U.S. District Court unconstitutionally denied plaintiff-appellant due process of law and demand for trial by jury (FRCP 5(d) and 38) R1-5), as well as the Title VII and ADEA relief petitioners set forth at United States District Court's docket entry 62 on 6/26/98. Therefore, U.S. District Court's dismissal of plaintiff-appellant's case is unconstitutional and should be reversed.

VII. Clearly, plaintiff-appellant has shown at paragraphs I through VI that the Office of Personnel Management (OPM); United States Army; Merit Systems Protection Board (MSPB) and Kenneth E. Vines, Defendants-Appellees' Counsel, as well as respondents, willfully, arbitrarily and capriciously violated and denied plaintiff-appellant due process of law and his statutory rights to exhaust administrative remedies continuously, from December 30, 1987, date United States Army commenced illegal soliciting petitioner for retirement, to December 28, 1999. The denial and violations of due process of law and statutory rights to exhaust administrative remedies is employment discrimination and unconstitutional as well as Title VII and ADEA relief petitioner's set forth at United States District Court's docket entry 62, on 6/26/98. Therefore, the 11th Circuit's decision, Appendix A, should be reversed.

VIII. The United States Court of Appeals for the Eleventh Circuit's decision, Appendix A, unconstitutionally affirmed the illegal denial of due process of law and statutory rights to exhaust administrative remedies perpetrated upon plaintiff-appellant by government agencies cited in paragraphs I through VII above. The denial of due process of law and statutory rights to exhaust administrative remedies is unconstitutional and employment discrimination. Therefore, 11th Circuit's decision, Appendix A, should be reversed.

REASONS FOR GRANTING THE WRIT

A. The substantive rule of evidence adopted by the Eleventh Circuit is contrary to the "substantial evidence" rule that has long been established as the standard of proof in cases for Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e et seq., and Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 USC 621 et seq., adjudications and which is a reasonable interpretation of those statutes, and consistent with the evidentiary rules of FRCA 56(a), (b), (c) and (d), App. 125; 42 USC 2000e-5 f(4) and f(5), App. 124; summary judgment under the Federal Rules and the well-established guaranty of "due process of law", which insures that public employees with a "claim of entitlement" to continued employment will receive from their governmental employer procedural fairness as a condition precedent to their discharge (see Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 331 L. Ed. 2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), which is contrary to petitioner's (Operations Research Analyst) March 31, 1988 illegal retirement by respondent United States Army (see the Complaint), under provisions of 5 USC 8336(c)(2) and (f) for firefighters and law enforcement officer, Appendix 96, and the intentionally and willfully concealing the illegal retirement for more than 12 years. The Eleventh Circuit's decision, Appendix A, failed to specify which of petitioner's 46 issues (i.e., United Stats District Court's 46 decisions on the case docket) were "an abuse of discretion", but impermissibly substituted its own pretextual views of petitioner's case, which petitioner absolutely and totally rejects. 5 USC 706(2) (emphasis added), App. 123. Where congress has explicitly or implicitly delegated to administrative agency authority to elucidate a provision of a statute the agency is charged with administering, a court may not substitute its own construction for a reasonable interpretation made by the agency. (Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on permissible construction of the statute."

1. 5 USC 7703(a)(1), (a)(2) and (b)(2), Appendix 88.

(a)(1). Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(a)(2). The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(2). Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 USC 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 USCA 633a(c)), and section 16(b) of the Fair Labor Standards of 1938, as amended (29 USC 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

The petitioner filed 5/8/97 EEOC charges, Appendix 98, against the Merits Systems Protection Board (MSPB) with Equal Employment Opportunity Commission (EEOC), which shows that all of the respondents have intentionally engaged in or are intentionally engaging in unlawful employment practices (42 USC 2000e-5(g)(1)), Appendix 30. The EEOC issued the 7/7/97 right to sue notice, Appendix 43. The United States District Court's Magistrate Judge, for pretextual reasons, failed to grant or deny petitioner's April 13, 1998 Motion for Joinder of Persons needed for Just Adjudication, namely, Chairman, Merit Systems Protection Board, on September 24, 1998, which is a prejudicial error and denial of due process of law, Appendix 38. The Eleventh Circuit's 12/28/99 decision, Appendix A, affirmed both United States District Court's 9/24/98 decision and 10/9/98 decision, Appendix D.

Consequently, the standard of review for the Eleventh Circuit's 12/28/99 decision, Appendix A, in this Title VII action and intentional employment discrimination case, is the clearly erroneous standard (see Fisher v. Vassar College, CA 2 (NY) 1997, 114 F. 3d 1332, certiorari denied. 118 S Ct. 851, 139 L Ed. 2d 752, rehearing denied 118 S. Ct. 1381, 1401 L. Ed. 2d 501; Gilligan v. Department of Labor, C.A. 9 (Or.) 1996, 81 F. 3d 835; Elmore v. Capstan, Inc., C.A. 10 (Kan.) 1995, 58 F. 3d 525; Smith v. University of North Carolina, C.A. (N.C.) 1980, 632 F. 2d 316; Kunda v. Muhlenberg College, C.A. 3 (Pa.) 1980, 621 F.2d 532; Hill v. Seaboard Coast Line R. Co., C.A. 11(Fla.) 1989 885 F.2d 804; and Brown v. Wesley's Quaker Maid, Inc., CA. 6 (Mich.) 1985, 771 F.2d 952, certiorari denied. 107 S. Ct. 116, 479 U.S. 830, 93 L.Ed. 2d63). Clearly, this case warrants review by United States Supreme Court.

2. 42 USC 2000e-5 f(4) and f(5) (emphasis added) 124 (Appendix ~~129~~). Paragraph f(4) of this statutory authority establishes a statutory duty of the chief judge of the district (or in his absence, the acting chief judge) to designate a judge in such district” to hear and determine” petitioner’s Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e et seq. case and Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 USC 621 et seq. case, i.e., case no. 97-01223-CV-D-N. The civil action, docket for case no. 97-01223-CV-D-N shows that the case was assigned to United States District Judge Ira DeMent and referred to Magistrate Judge Susan R. Walker for all pretrial matters on September 11, 1997.

Paragraph f(5) of the statutory authority establishes the statutory duty for the judge designated pursuant to this subsection, United States District Court Judge Ira DeMent, to assign petitioner’s Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e et seq. case and Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 USC 621 et seq. case for hearing at the earliest practicable date. The Civil Action, docket no. 97-01223-CV-D-N, shows that United States District Court Judge Ira DeMent and Magistrate Judge Susan R. Walker DID NOT perform the statutory duty to assign petitioner’s case no. 97-01223-CV for hearing, which clearly and irrevocably makes the 11th Circuit’s 12/28/99 decision, Appendix A, illegal, erroneous, arbitrary, capricious, an abuse of discretion (see Wis.-State ex rel. Miller v. Manders, 86 N.W. 2d 469, 2 Wis. 2d 365), otherwise not in accordance with the law, contrary to constitutional rights, without observance of procedure required by law, a prejudicial error, unconstitutional and violative of petitioner’s fundamental rights. See Wash.-King County v. Washington State Bd. of Tax Appeals, 622 P. 2d

898, 28 Wash. App. 230.

Clearly, this is an ADEA Case and Title VII intentional employment discrimination case. Consequently, the standard of review is clearly erroneous standard. (Fisher v. Vassar Collete, C.A. 2 (NY) 1997, 114 F.3d 1332, certiorari denied. 118 S.Ct. 851, 139 L.Ed. 2d 752, rehearing denied. 118 S.Ct. 1341, 140 L.Ed. 2d 501; Elmore v. Capstan, Inc., C.A. 10 (Kan.) 1995, 58 F.3d 525 and Gilligan v. Department of Labor, C.A. 9(Or.) 1996, 81F. 3d 835). Consequently, this case warrants review by United States Supreme Court.

3. The petitioner appealed to the Eleventh Circuit, in his principal brief, to review 46 United States District Court's decisions for abuse of discretion in case number 97-01223-CV-D-N, but the Eleventh Circuit's 12/28/99 decision, Appendix A, shows that the Eleventh Circuit not only failed to review the 46 decisions, as specified, but simply substituted its own views of petitioner's Title VII intentional employment discrimination case and ADEA case, which was pretextually and illegally dismissed by United States District Court on 10/9/98.

Both the deferential standard of review (Bina v. Providence College, C.A.1 (R.I.) 1994, 39 F.3d 21, certiorari denied. 115 S.Ct. 1406, 514 U.S. 1038, 131 L. Ed. 2d 292) and the clearly erroneous standard Fisher v. Vassar College, C.A. 2 (N.Y.) 1997, 114 F. 3d 1332, certiorari denied 118 S. Ct. 851, 139 L. Ed. 2d 752, rehearing denied 118 S. Ct. 1341, 140 L. Ed. 2d 501; Elmore v. Capstan, Inc. C.A. 10 (Kan.) 1995, 58 F. 3d 525 and Gilligan v. Department of Labor, C.A. 9 (Or.) 1996, 81 F.3d 835) appropriately applies. Consequently, petitioner's case warrants review by United States Supreme Court.

4. Federal Rules of Civil Procedure (FRCP) 56(a), (b), (c), and (d) - Summary Judgment, Appendix 125.

FRCP 56(c) Motion and Proceedings Thereon, states that "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. If any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

This summary judgment should be reversed for reasons set forth below:

a. The United States District Court willfully and intentionally failed to conduct the required statutory hearing (see People v. Quenditti, 276 C.A. 2d 178, 80 Cal. Rptr 761, 762). Consequently, the Eleventh Circuit's 12/28/99 summary judgment decision, Appendix A, is unconstitutional, which created an evidentiary dispute.

b. The misconduct of Kenneth E. Vines, Assistant United States Attorney and Counsel for respondents, who willfully and intentionally delivered appellee brief to appellant eight (8) days after the 4/19/99 due date for appellant's reply brief had passed. Eleventh Circuit denied appellant's motion to file out of time (late) Reply Brief, which is unconstitutional and created an evidentiary dispute and an inference that there is a genuine issue as to a material facts, as well as a dispute over testimonial demeanor or credibility and as set forth at Question I.

c. The record shows that respondents or their counsel failed to answer, sign or object to the request for admissions during time frame and 7/16/98 deadline set by United States District Court's 4/1/98 Scheduling Order, USCD docket entry #46). Consequently, respondents have admitted to the allegations of petitioner's case and Law of the Case appropriately applies.

d. The United States District Court arbitrarily, capriciously, and intentionally failed to adjudicate petitioner's ADEA case and award statutory relief, including the Title VII and ADEA relief petitioner's set forth at United States District Court's docket entry 62, on 6/26/98. Clearly, there is a genuine issue as to amount of damages for the ADEA case, as well as the Title VII case. Consequently, a summary judgment, interlocutory in character, should be rendered to petitioner, on the issue of liability for the Title VII case and the ADEA case.

e. Respondent Merit Systems Protection Board (MSPB) clearly has not answered petitioner's Title VII case and ADEA case, creating an evidentiary dispute and reasonable inferences in favor of petitioner (In re Smith Bkrtcy. D.N.H. 1995, 189 B.R. 240 and In re Quinones Rivera, D. Puerto Rico 1995, 184 B.R. 174).

f. Additionally, petitioner's complaint and pleadings, including request for equitable and legal relief of being reinstated to his Operations Research Analyst position, have declared illegal, involuntary, a nullity and unauthorized his 3/31/88 5 USC 8336(c)(2) and (f) retirement, which created several genuine issues of material facts as to the legality, voluntariness, nullity (Salter v. Hilgen, 40 Wis. 363, 365) and authority of that retirement (Wilson v. Shultz, 1973, 475 F.2d 997, 155 U.S. App. D.C. 4 and Paroczay v. Hoges, 1961, 297 F. 2d 439, 111 U.S. App. D. (362)), which precludes summary judgment.

g. Respondents' willfully and intentionally used 5 USC 8336(c)(2) and (f), the retirement authority for fire fighters, law enforcement officers and personnel, at least 62 years of age (petitioner was age 54, on 3/31/88), to retire petitioner, an Operations Research Analyst, who has B.S. degree in Mathematics and Physics, M.B.A. degree in Management and Finance and M.A. degree in Human Resources Management, is constitutionally invalid and raised substantial fact issues precluding summary judgment (Rosenberg v. Allen, D.C.N.Y. 1966, 258 F. Supp. 511), which occurred while petitioner participated in federal protected activity of filing EEO complaints against United States Army, 7/85 to 3/88.

h. Lastly, the statutory hearings required and mandated by 42 USC 2000e-5 f(4) and (f)5), Appendix 124, and FRCP 56(c) and (d), Appendix 124, was not conducted .135 by United States District Court, as shown by the Court's docket entries. Consequently, the court willfully suppressed petitioner's opportunity to demonstrate that there were additional real disreputes as to the evidentiary facts or that there was more probative evidence to present.

For these reasons the Supreme Court should review this case. The standard of view for summary judgment is de novo.

5. 29 CFR 1601 28(d) Civil Rights 42 foll. U.S.C.A. 2000e-4 (emphasis added) (Appendix 124). This regulatory 124-- authority permits the Equal Employment Opportunity Commission (EEOC) to issue the notice of right to sue, Appendices 43 and 44, for 5/8/97 EEOC charges (i.e., Appendix 98) against respondents government (i.e., United States of America) and governmental agencies (i.e., Merit Systems Protection Board (MSPB), Office of Personnel Management (OPM) Agency, and United States Army, see List of Parties, page xiii), when there had been a dismissal of the charges, Appendix 98. The petitioner received the dismissal and the notice of right to sue (i.e., Statement of Petitioner's Rights-Right to File a Civil Action (W1092), Appendices 43 and 44, dated July 7, 1997) on July 14, 1997

(i.e., signed EEOC's Certified Return Receipt). Petitioner timely filed Civil Action, Docket No. 97-01223-CV-D-N, in United States District Court for the Middle District of Alabama on August 11, 1997. United States District Court's September 24, 1998 Decision to not grant or deny petitioner's April 13, 1998 Motion for Joinder of necessary persons needed for just adjudication, namely, Chairman, Merit Systems Protection Board, which clearly and irrevocably makes the 11th circuit 12/28/99 decision, Appendix A, arbitrary, capricious, erroneous, an abuse of discretion, otherwise not in accordance with law, contrary to constitutional right, without observance of procedure required by law and a prejudicial error. Consequently, the Supreme Court should review this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

Raymond Jackson

Date: July 15, 2000

U. S. Court of Appeals for the Eleventh Circuit 12-28-99 Decision for Case No. 98-6992

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-6992
Non-Argument Calendar

D.C. Docket No. 97-01223-CV-D-N

RAYMOND JACKSON,

Plaintiff-Appellant,

versus

JAMES B. KING, Director,
Office of Personnel Management Agency,
USA, United States of America, and
TOGO D. WEST, JR., Secretary of the Army,

Defendant-Appellees.

Appeal from the United States District Court for the
Middle District of Alabama

(December 28, 1999)

Before ANDERSON, Chief Judge, DUBINA, Circuit Judge and FAY, Senior Circuit Judge.

OER CURIAM:

Raymond Jackson, a retired operations research analyst for the United States (U.S.) Army, appeals for the district court's entry of summary judgment in his pro se Title VII, 42 U.S.C. 2000e-16(c), and Age Discrimination in Employment (ADEA), 29 U.S.C. 633, action.

Jackson generally challenges the dismissal of his case. He argues that the district court's order granting the defendants' motion for extension of time to file an answer to his complaint was "arbitrary, capricious, [and] unconstitutional," and as such, the defendants' answer was untimely. He generally challenges the district court's refusal to allow him to amend his complaint to add claims and join Ben Erdreich as a necessary party.

Finally, Jackson contends that the district court erred by entering numerous orders.

The Court reviews grants of summary judgment de novo, using the same legal standard as the district court. Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1374 (11th Cir. 1996). This Court may affirm on any ground, regardless of whether relied upon or even considered by the district court. Young v. Comm'r of Internal Revenue, 926 F.2d 1083, 1090 (11th Cir. 1991). Review of the district court's ruling on a motion for an extension of time is for abuse of discretion. See Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 859 (11th Cir. 1990) (reviewing for abuse of discretion the district court's denial of a motion to file a response out of time to a summary-judgment motion). This Court reviews the district court's denial of a motion to amend for abuse of discretion. Technical Resource Servs. v. Dornier Medical Sys., 134 F.3d 1458, 1463-64 (11th Cir. 1998).

Upon review of the pleadings and motions, the magistrate judge's report and recommendation and orders, the district court's orders, the briefs of the parties, and all relevant law, we find no reversible error.

Upon Jackson's receipt of a memorandum that falsely informed him of his eligibility for early retirement, he signed an application for immediate retirement. OPM inadvertently granted it, and Jackson retired on March 31, 1988. After OPM discovered its mistake, it granted an exception to Jackson so that he would not have to return to active duty. OPM directed the Army to notify Jackson of the "regularization" of his retirement. Jackson alleged that he did not receive such notification until March 8, 1997.

OPM notified Jackson that his monthly retirement annuity was subject to reduction when he became 62 years old because of his inability to use his military service for both Civil Service and Social Security benefits. Subsequently,

OPM advised Jackson that his monthly retirement annuity would be reduced on March 1, 1996, because he was eligible for Social Security benefits and had not deposited seven percent of the estimated income that he received while on active duty in the military, into the Civil Service Retirement System. Such a deposit was necessary for Jackson to receive credit for his military service, for the purposes of computing his retirement annuity. OPM then granted Jackson an extension of time to make the deposit, but he never made one.

Jackson appealed both of these decisions to the Merit Systems Protection Board (MSPB). He filed an involuntary-retirement claim with an administrative law judge (ALJ) for the MSPB 19 days after filing the present action, alleging that the decision was unlawful discrimination on the basis of his race, sex, and age. After the ALJ deemed his claim untimely, Jackson appealed to the Federal Circuit, which dismissed his appeal because Jackson failed to file a timely brief.

In separate proceedings conducted before the present action, the MSPB denied Jackson's appeal regarding the reduction of his retirement annuity. The ALJ rejected "out of hand" Jackson's claims that race and sex discrimination motivated this action, but did not consider his age-discrimination claim. Jackson failed to raise any of his discrimination claims in his appeal to the Federal Circuit.

Jackson also filed a FOIA request with OPM on January 9, 1997, requesting copies of all of Jackson's personnel records. The proper OPM office received this request on February 24, 1997. In a letter dated March 6, 1997, OPM indicated that it would send all of the requested records to Jackson, except for records related to his employment with the U.S. Postal Service, as it lacked jurisdiction to release that information. Accordingly, OPM forwarded these records to the U.S.Postal Service for further action.

Jackson filed this action in federal court, naming James B. King, Director of the Office of Personnel Management (OPM), as defendant, and seeking damages and injunctive relief. Jackson alleged that OPM forced him into early retirement without notifying him of his appeal rights, and mishandled a discrimination claim based upon his involuntary retirement. Jackson also alleged that OPM reduced his monthly retirement annuity. He claimed that OPM failed to respond to his FOIA letter within 10 days, as required. Jackson vaguely alleged that OPM failed to answer a letter that he wrote on January 11, 1996. Jackson had written this letter to an OPM benefits specialist before he appealed the retirement-annuity claim to the MSPB,-generally challenging the computation of his retirement annuity. Jackson averred that OPM discriminated against him because of his race, sex, ,and age, based upon these actions. Finally, Jackson vaguely alleged that an MSPB administrative law judge (ALJ), in her decision denying his retirement-annuity claim, refused to conduct a hearing on a stay-of-personnel action, and failed to resolve a backpay claim and notify him of his appeal rights.

Jackson filed a motion to amend his complaint to include the United States and Togo D. West, Jr., Secretary of the Army, as defendants, claiming that they were necessary parties to the litigation. The magistrate judge granted this motion.

The defendants filed a motion for an extension of time to file a responsive pleading, alleging that OPM had not submitted the declarations needed to support a dispositive motion. Jackson filed motions for the entry of default and a default judgment. The magistrate granted the motion for an extension of time, deeming the agency's compilation of a litigation report essential to the preparation of a responsive pleading. Accordingly, the magistrate denied Jackson's motions.

The defendants filed a motion to dismiss, or in the alternative, for summary judgment. The defendants argued that West, the head of the agency for which Jackson was employed, was the only proper defendant. They argued that the district court should dismiss the action against OPM for lack of jurisdiction because the MSPB and the Federal Circuit are the only entities that may review OPM's retirement decisions. The defendants contended that Jackson's claim that he was involuntarily retired was untimely filed with the MSPB. The defendants also alleged that Jackson failed to exhaust his administrative remedies on this claim because he filed his complaint in the district court before appealing to the MSPB. Finally, the defendants argued that Jackson had already appealed the MSPB's unfavorable disposition on his annuity-reduction claim to the Federal Circuit, and had accordingly "elected his forum for review for this decision." The defendants did not respond to Jackson's remaining claims.

In a report and recommendation, the magistrate recommended granting summary judgment for the defendants. The magistrate found that Jackson untimely filed his involuntary-retirement claim to the MSPB, and abandoned this claim by filing an untimely brief to the Federal Circuit. Although the Federal Circuit could not have reviewed the discrimination aspect of this claim, it could have considered the MSPB's finding that his appeal was untimely, and remanded to the MSPB for consideration of the discrimination and nondiscrimination aspects of his claim on the merits. Accordingly, Jackson failed to exhaust his administrative remedies with respect to this claim.

The magistrate also found that Jackson abandoned his retirement-annuity claim by failing to allege discrimination at the Federal Circuit level. Alleging discrimination would have resulted in a transfer of the entire case to the district court. Because the Federal Circuit ruled upon the nondiscrimination aspect of the retirement-annuity claim, however, permitting Jackson to raise the discrimination elements of his claim in the district court would bifurcate his appeal, which is contrary to congressional intent. Finally, the magistrate found no indication that Jackson exhausted administrative remedies with respect to his FOIA or failure-to-answer claims. Over Jackson's objections, the district court adopted the magistrate's report and recommendation, and dismissed any remaining claims with prejudice.

Jackson had also filed several motions to amend his complaint, vaguely (1) challenging the MSPB's disposition of his complaints; (2) enumerating his monetary damages; and (3) alleging numerous defendants' "wrongful concealment" of his retirement. Jackson also sought to join Ben Erdreich, Chairman of the MSPB, as a necessary party, vaguely alleging that at least one MSPB employee (the MSPB ALJ referenced in his complaint) discriminated against him. The magistrate denied Jackson's various motions to amend and add parties, finding that allowing Jackson to amend his complaint would be futile in light of her recommended disposition of the case.

Jackson generally challenges the dismissal of his case. The government responds that Jackson failed to exhaust his administrative remedies with respect to his involuntary-retirement and FOIA claims, and abandoned his retirement-annuity claim.

This Court reviews grants of summary judgment de novo, using the same legal standard as the district court. Mayfield v. Patterson Pump Co., 101 F.3d1371, 1374 (11th Cir. 1996). Summary judgment is proper when "there is no genuine issue as to any material fact." Fed.R.Civ.P.56(c). Also, the Court views all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. Hale v. Tallapoosa County, 50F.3d 1579, 1581 (11th Cir. 1995).

Involuntary-retirement claim

A federal employee must exhaust all available administrative remedies before he may sue for discrimination in federal court. Brown v. General Services Administration, 425 U.S. 820, 832-35, 96 S.Ct. 1961, 1967-69, 48 L.Ed.2d 402 (1976). Persuasive authority indicates that "[t]he exhaustion doctrine is equally applicable to suits filed under Title VII through the provisions of the CSRA [Civil Service Reform Act]." Downey v. Runyon, 160 F.3d 139, 415 (2d Cir. 1998). The CSRA provides remedies for federal employees appealing certain adverse personnel actions. Lee v. Hughes, 145 F.3d 1272, 1274 (11th Cir. 1998), cert.denied, 119 S.Ct. 1026 (1999). Under the CSRA, the employee may file his claim regarding an involuntary retirement and related discrimination issues before the MSPB, or appeal this "mixed case" through his employing agency. See 5 USC 7702 (noting appealability of adverse actions and discrimination claims to MSPB); see also 29 C.F.R. 1614.302(b) (employee may not proceed with both agency and MSPB appeal); Cooper v. Department of the Navy, 108 F.3d 324, 326 (Fed. Cir. 1997) (stating that MSPB has jurisdiction over involuntary-retirement claim). An appeal to the MSPB must be filed within 30 days of the action being appealed. 5 C.F.R. 1201.22(c). The employee may seek review of the MSPB's decision in the district court. See U.S.C. 7702(a)(3).

The record shows that Jackson filed his MSPB appeal for his involuntary-retirement claim 19 days after filing the present action in district court. Because Jackson failed to appeal the retirement issue to the MSPB before initiating his civil action, he failed to exhaust his administrative remedies with respect to this claim. See 5 U.S.C. 7702(a)(3) (providing for judicial review upon issuance of MSPB's decision).

Moreover, the record shows that Jackson filed his MSPB appeal about nine years after his retirement, and about six months after receiving notification that his retirement was "regularized." Thus, at the earliest, Jackson filed his MSPB appeal about six months after the adverse employment action occurred. Because he failed to appeal to the MSPB within 30 days, see 5 C.F.R. 1201.22(c), he did not exhaust his administrative remedies with respect to his Title VII claim. See generally Harper v. Jenkin, 179 F.3d 1311, 1312 (11th Cir. 1999) (permitting prisoner who filed an untimely grievance to claim that he exhausted remedies under Prison Litigation Reform Act (PLRA) would enable him to circumvent PLRA's exhaustion requirements).

The district court never specifically addressed Jackson's ADEA claim, but dismissed all remaining claims with prejudice. Nevertheless, this Court may affirm on any ground, regardless of whether relied upon or even considered by the district court. Young v. Comm'r of Internal Revenue, 926F.2d 1083, 1090 (11th Cir. 1991). To establish a prima facie case under the ADEA, a plaintiff must show, interalia, that he suffered an adverse personnel decision. See Mitchell v. Worldwide Underwriters Inc. Co., 967 F.2d 565, 566 (11th Cir. 1992). The record shows that Jackson requested early retirement, and that OPM granted his request even after it discovered that he was ineligible for early retirement. Thus, Jackson has failed to demonstrate that he suffered an adverse personnel decision because of his age. The district court's entry of summary judgment on Jackson's involuntary-retirement claim was proper.

Retirement-annuity claim and related claim

Under the CSRA, Jackson could appeal the MSPB's resolution of his retirement-annuity claim to the Federal Circuit, or this claim and the related discrimination claims to the district court. See 5 U.S.C. 7702(a)(3) (providing for judicial review of "mixed cases"); 7703(b)(2) (providing for judicial review of MSPB decisions of Title VII and ADEA claims); 7703(b)(1) (providing that Federal Circuit Court of Appeals has plenary jurisdiction to review an MSPB case that does not involve discrimination claims). Thus, the CSRA implicitly does not allow review of discrimination and nondiscrimination review in different forums. See id.; see also Doyal v. Marsh, 777 F.2d 1526, 1535-37 (11th Cir. 1985) (determining that district court should not have dismissed appellant's civil-service claims in Title VII action because, interalia, Congress never intended to bifurcate the appeals process between the Federal Circuit and the district court).

As discussed above, the MSPB denied Jackson's appeal regarding the reduction of his retirement annuity on the merits. The Federal Circuit affirmed this order on the merits, and Jackson failed to raise any of his discrimination claims in that appeal. The district court correctly noted that its consideration of Jackson's discrimination claims would effectively bifurcate the appeal. Because such bifurcation would be impermissible under the CSRA, see 5 U.S.C. 7702(a)(3), 7703(b)(1), the district court correctly entered summary judgment on Jackson's retirement-annuity claim.

Regarding Jackson's response that OPM never responded to his January 11, 1996, letter, the record supports the magistrate's finding that Jackson never demonstrated that he exhausted his administrative remedies with respect to this claim. (See generally Record on Appeal). Jackson could have brought this claim with his closely related retirement-annuity claim before the MSPB and the Federal Circuit, but failed to do so. Accordingly, summary judgment was proper.

Freedom of Information Act (FOIA) claim

As discussed above, the magistrate found that Jackson did not exhaust his administrative remedies with respect to this claim. An individual must exhaust administrative remedies before bringing a FOIA claim in federal court. Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994). The individual has exhausted such remedies if he shows that the agency has (1) denied all or part of his request (which would constitute actual exhaustion); or (2) failed to comply with time limitations for responding to the request (which would constitute constructive exhaustion). Id. at 1368. As enacted in 1997, 5 U.S.C. 552 required a federal agency that receives a FOIA request to determine, within 10 days of receipt, whether to comply with the request, and immediately notify the requestor of its decision. See 5 U.S.C. 552(a)(6)(A)(I)(1997).

Jackson essentially alleged that he constructively exhausted his remedies-that is, that OPM failed to comply with his FOIA request within 10 days, as required by 5 U.S.C. 552. The record shows, however, that the proper OPM office received Jackson's letter on February 24, and responded on March 6-ten days later. Thus, because OPM complied with the time requirements for responding to Jackson's request, he has not constructively exhausted his administrative remedies with respect to his claim. Moreover, Jackson has not alleged facts that would demonstrate actual exhaustion, and the record shows that OPM did not deny any of his requests. See Taylor, 30 F.3d at 1368 (actual exhaustion requires agency's denial of all or part of request). Accordingly, the district court properly granted summary judgment on this claim.

Claims involving the MSPB ALJ

Jackson vaguely alleged that the MSPB ALJ who denied his retirement-annuity claim discriminated against him by failing to (1) conduct a hearing on a stay-of-personnel action; (2) resolve a backpay claim; and (3) notify him of his appeal rights. The district court did not specifically address this claim, but dismissed all remaining claims with prejudice.

As mentioned earlier, this Court may affirm on any ground. Young, 926 F.2d at 1090. Title VII and the ADEA both prohibit unlawful employment discrimination. See generally 42 U.S.C. 2000e; 29 U.S.C. 633. Thus, even if the MSPB ALJ's alleged actions were discriminatory, they would not violate Title VII or the ADEA because Jackson was not her employee. Moreover, Jackson presents no facts indicating that his employer was responsible for the MSPB ALJ's alleged discrimination. Dismissal of these claims was proper.

Extension of time to respond to the complaint

Jackson argues that the district court's order granting the defendants' motion for extension of time to file an answer to his complaint was "arbitrary, capricious, [and] unconstitutional," and as such, the defendants' answer was untimely. The government responds that it timely filed its dispositive motion after the district court granted its motion for an extension of time.

The magistrate granted the defendants' motion based upon her belief that they needed to compile a litigation report to file their dispositive motion. Review is for abuse of discretion. See Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 859 (11th Cir. 1990) (reviewing for abuse of discretion the district court's denial of a motion to file a response out of time to a summary-judgment motion). This Court has determined that district courts have broad discretion to manage their own cases. Chaudasama v. Mazda Motor Corp., 123 F.3d 1353, 1366 (11th Cir. 1997). Because the defendants' request to wait for information from OPM, whose officials' alleged actions constitute the basis of this suit, before filing a dispositive motion was not unreasonable, the magistrate's decision to allow an extension of time for this purpose was not an abuse of discretion.

Futility of amending the complaint

Jackson generally challenges the district court's refusal to allow him to amend his complaint to add claims and join Ben Erdreich as a necessary party.

This Court reviews the district court's denial of a motion to amend for abuse of discretion. Technical Resource Servs. v. Dornier Medical Sys., 134 F.3d 1458, 1463-64 (11th Cir. 1998). Rule 15(a) of the Federal Rules of Civil Procedure provides that "leave [to amend a party's pleading] shall be freely given when justice so requires." See Fed.R.Civ.P.15(a). Futility is an adequate basis for denying leave to amend. Burger King Corp. v. Weaver, 169F.3d1310, 1319 (11th Cir. 1999). This Court has found that denial of leave to amend may be justified by futility when "the complaint as amended is still subject to dismissal." Id. at 1320 (citations omitted).

Jackson's motions to amend his complaint included (1) vague challenges to the MSPB's disposition of his complaints; (2) an enumeration of his proposed monetary damages; (3) a claim that numerous defendants wrongfully concealed his retirement; and (4) a request to join Ben Erdreich, Chairman of the MSPB, as a necessary party. Upon examination of these proposed amendments to Jackson's complaint, the magistrate committed no reversible error by denying the motions to amend. Claims (1) and (3) essentially reiterate the substantive merits of Jackson's involuntary-retirement and retirement-annuity claims. Ad discussed earlier, the district court properly entered summary judgment on those claims, and accordingly, amendment of the complaint to include these "new" claims would be futile. Amendment of the complaint to include Claim (2) would be futile, for the same reason. Finally, because Jackson seemed to allege that Erdreich was a necessary party to resolve Jackson's claims regarding the MSPB ALJ, and those claims were meritless, the district court's refusal to join Erdreich as a party was not an abuse of discretion.

Denial of miscellaneous motions

Jackson challenges the district court's alleged failure to cite legal grounds for denying (1) a motion for a default judgment motions to strike the defendants' motion to dismiss and reply to Jackson's response to the motion and (3) a motion to strike exhibits. Jackson also appeals the district court's orders (1) granting the defendants' motion to stay discovery, as he had not het filed a response; (2) disposing of Jackson's motions less promptly than defendants' motions; (3) denying Jackson's motion to compel discovery; (4) denying Jackson's motion to compel the defendants to make retirement-annuity deposits into his retirement account; (5) denying Jackson's motion to compel King to process his application to make a deposit into his retirement account; (6) granting the defendants' motion to clarify a discovery order; (7) denying Jackson's motion that the defendants be held in contempt for failure to timely file objections to the discovery order; and (8) denying Jackson's motion to make additional findings after the district court entered judgment. We simply find no merit in any of these contentions.

We conclude that Jackson's claims were either administratively unexhausted, not properly before the district court, or meritless. Jackson's remaining arguments on appeal are meritless.

AFFIRMED.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303
Thomas K. Kahn
Clerk

In Replying Give Number
Of Case and Names of
Parties

December 28, 1999

MEMORANDUM TO COUNSEL OR PARTIES

RE: 98-6992-CC Jackson v. King
DC DKT No.: 97-01223 CV-D-N

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Fed.R.App.P. 39, 40 and 41, and the corresponding circuit rules govern costs, petitions for rehearing and mandate, respectively.

To be timely, a petition for rehearing or for rehearing en banc must be received in the clerk's office within twenty-one (21) days of the date of this opinion and judgment, except that: in CIVIL cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall bey FORTY-FIVE (45 DAYS) after entry of judgment. See Fed.R.App.P.40(a). No additional time for service by mail is permitted. See 11th Cir.R. 40-2.

If attorney's fees on appeal are authorized by law in CIVIL cases, they must be sought by filing a petition for attorney's fees with this office within fourteen (41) days of the date of this letter. Davidson v. City of Avon Park, 848 F.2d 172, 174 n.4 (11th Cir., 1988).

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later).

Pursuant to Fed.R.App.P. 39, costs to be taxed against Plaintiff-Appellant.

Sincerely,
s/THOMAS K. KAHN, Clerk
Reply To: Jennifer Johnson (404) 335-6146
Encl. OPIN-1A(9-1999)

U. S. Court of Appeals for the Eleventh Circuit Order 98-6992, dated December 28, 1999.

United States Court of Appeals
For the Eleventh Circuit

No. 98-6992
Non-Argument Calendar

District Court Docket No. 97-01223-CV-D-N

RAYMOND Jackson,
Plaintiff-Appellant,

versus

JAMES B. KING, Director,
Office of Personnel Management Agency,
USA, United States of America, and TOGO D. WEST, JR., Secretary of the Army,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before ANDERSON, Chief Judge, DUBINA, Circuit Judge, and FAY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said

District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiff-appellant pay to the defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 28, 1999
For the Court: Thomas K. Kahn, Clerk
s/ By Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: March 03 2000

U.S. Court of Appeals Eleventh Circuit's Order for Rehearing, No. 98-6992, dated February 22, 2000.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6992

RAYMOND JACKSON,

Plaintiff-Appellant,

versus

JAMES B. KING, Director,
Office of Personnel Management Agency,
USA, United States of America, and
TOGO D. WEST, JR., Secretary of the Army,

Defendant-Appellees.

On Appeal from the United States District Court for the
Middle District of Alabama

BEFORE: ANDERSON, Chief Judge, DUBINA, Circuit Judge and FAY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Raymond Jackson is DENIED.

ENTERED FOR THE COURT:

s/Peter Fay
SENIOR UNITED STATES CIRCUIT JUDGE

ORD-41

U.S. District Court Order for Civil Action 97-D-1223-N, dated October 9, 1998.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

RAYMOND JACKSON,)
Plaintiff,)
vs.) CIVIL ACTION 97-D-1223-N
JAMES B. KING, Director)
of the Office of Personnel)
Management, Et AL.,)
Defendants.)

ORDER

This cause is now present to the court on the Recommendations of the Magistrate Judge, filed September 24, 1998, and plaintiff's objections thereto, filed October 6, 1998.

The court has carefully read the recommendations and objections and is of the opinion that said recommendations are well taken and are due to be adopted, approved and affirmed. It is, therefore, CONSIDERED, ORDERED and ADJUDGED as follows:

1. That plaintiff's objections be and the same are hereby OVERRULED;
2. That the Recommendations of the Magistrate Judge in this cause be and the same is hereby ADOPTED, APPROVED and AFFIRMED;
3. That plaintiff's motions (Docs. 40, 41, 43, 45, 47-49, 54, 55, 58, 65, 68) be and the same are hereby DENIED;
4. That defendants' motion for clarification filed May 21, 1998, be and the same is hereby GRANTED;
5. That plaintiff's motions for orders of civil

contempt and sanctions and his motion for default judgment be and the same are hereby DENIED;

6. That defendants' motion to dismiss or, in the alternative, for summary judgment be and the same is hereby GRANTED;

7. That plaintiff's claims regarding OPM's failure to respond to plaintiff's FOIA request within ten days and to respond to plaintiff's January 11, 1996, letter be and the same is hereby DISMISSED without prejudice; and

8. That the remainder of plaintiff's claims be and the same are hereby DISMISSED with prejudice.

DONE this 9th day of October, 1998.

s/ Ira DeMent
UNITED STATES DISTRICT JUDGE

Title 28 Appendix - Rules of Appellate Procedure
Title VII. General Provisions
Rule 25. Filing and Service

(a) *Filing*. - A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the judicial Conference of the United States. The clerk must not refuse to accept for filing any paper presented for that purpose solely it is not presented in the proper form as required by these rules or by any local rules or practices.

(b) *Service of all papers required.* - Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) *Manner of service.* - Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) *Proof of Service.* - Papers presented for filing must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed.

(e) *Number of Copies.* - Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

(As amended Mar. 10 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. .22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994.)

Title 28, Appendix - Rules of Appellate Procedure

Title VII. General Provisions.

Rule 31. Filing and Service of a Brief

(a) *Time for serving and filing briefs.* - The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

(b) *Number of Copies to Be Filed and Served.* - Twenty-five copies of each brief must be filed with the clerk, and two copies must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies must be filed with the clerk, and one copy must be served on counsel for each party separately represented.

(c) *Consequence of failure to file briefs.* - If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986; Apr. 29, 1994, eff. Dec. 1, 1994.)

Title 28, Appendix - Rules of Civil Procedure

Rule 12. Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) HOW PRESENTED. *Every* defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, 92) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) MOTION FOR MORE DEFINITE STATEMENT. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) CONSOLIDATION OF DEFENSES IN MOTION. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993)

The Constitution of the United States
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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29 CFR Ch. IV (7/1/99 Edition) Equal Employment Opportunities Commission

Subpart B - Provisions Applicable to Particular Complaints

1614.201 Age Discrimination in Employment Act

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, Federal Sector Programs, 1801 L St., NW., Washington, DC 20507 within 180 days of the occurrence of the alleged unlawful practice.

(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

(c) When an individual has filed an administrative complaint alleging age discrimination that is not a mixed case, administrative remedies will be considered to be exhausted for purposes of filing a civil action:

(1) 180 days after the filing of an individual complaint if the agency has not issued a final decision and the individual has not filed an appeal or 180 days after the filing of a class complaint if the agency has not issued a final decision;

(2) After the issuance of a final decision on an individual or class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal if the Commission has not issued a final decision.

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5 CFR Ch. 1 (1-1-00 Edition) Office of Personnel Management Subpart U-Deposits for Military Service.

831.2101 Purpose.

This subpart prescribes the procedures to be followed when an employee or Member (or survivor of an employee or Member) wishes to make a deposit for service, and when a former employee or Member who retires or separates from civilian service with title to annuity after September 8, 1982, but before October 1, 1983 (or survivor of such employee or Member), wishes to make a deposit for service.

831.2101 Scope.

This subpart applies to all agencies with employees occupying positions subject to subchapter III of chapter 83 of title 5, United States Code, the United States Senate, and the United States House of Representatives.

831.2103 Definitions.

Employee shall have the same meaning as in 5 USC 8331(1).

Estimated earnings is an estimate of basic pay for a period of military service, as determined by an authorized official of the Department of Defense the Department of Transportation, the Department of Commerce, or the Department of Health and Human Services.

Fund is the Civil Service Retirement and Disability Fund.

Member shall have the same meaning as in 5 USC 8331(2).

OPM is the Office of Personnel Management.

Period of service is the total years, months, and days from date of initial entry on active duty (or January 1, 1957, if that is later) to date of final discharge for enlisted military personnel, and to date of final release from active duty for officers and reservists. "Period of service" includes consecutive periods of service where there is no break in service, but does not include any lost time.

Service is active honorable military service performed after December 31, 1956.

Sufficient evidence of basic pay for service exists when the employee, Member, or survivor eligible to make a deposit for service provides copies of all official military pay documents, as identified in Federal Personnel Manual instructions published by OPM, which show the exact basic pay he or she received for a full period of service. If an employee, Member, or survivor does not have sufficient evidence of basic pay, he or she shall obtain a statement of estimated earnings from the appropriate branch of the military service.

Survivor shall have the same meaning as in 5 USC 8331(10).

831.2104 Eligibility to make deposit.

The following individuals may make deposit for any full period of service performed before the separation on which title to civil service annuity is based:

(a) An employee or Member currently occupying a position subject to subchapter III or chapter 83 of title 5. United States Code, and the survivor(s) of such an employee or Member who dies in service (including a person who was eligible to make a deposit under this paragraph but who failed to make the deposit before separation from service due to administrative error); and

(b) A former employee or Member who was separated with title to an annuity to who retired from a position subject to subchapter III of chapter 83 of title 5, United States Code, after September 8, 1982, and before October 1, 1983, and the survivor(s) of such an employee or Member.

[48 FR 38788, Aug. 26, 1983, as amended at 49 FR 20631, May 16, 1984]

831.2105 Filing an application to make deposit.

(a) An individual described in 831.2104(a) of this subpart shall file an application for deposit with the appropriate office in the employing agency, or, for Members and Congressional employees, with the Secretary of the Senate or the Clerk of the House of Representatives, as appropriate.

(b) An individual described in 831.2104(b) of this subpart may, at the time of filing an application for retirement or death benefits, file an application for deposit or complete a deposit with OPM.

831.2106 Processing applications for deposit for service.

(a) The agency, Clerk of the House of Representatives, or Secretary of the Senate shall have the employee or Member:

(1) Complete an application to make deposit;

(2) Provide a copy of his or her DD 214 or its equivalent to verify the period(s) of service; and

(3) Provide sufficient evidence of basic pay, if available, or a statement of estimated earnings.

(b) Upon receipt of the application, the DD 214(s), and either sufficient evidence of basic pay, if available, or a statement of estimated earnings, the agency, Clerk of the House of Representatives, or Secretary of the Senate shall multiply the amount of basic pay by 7 percent to compute the exact deposit owed, exclusive of any interest.

(c) If interest is applicable, it shall be computed in accordance with instructions published by OPM in the Federal Personnel Manual.

(d) The agency, Clerk of the House of Representatives, or Secretary of the Senate shall establish a deposit account showing the total amount due, and a payment schedule (unless deposit is made in a lump sum), and record the date and amount of each payment.

(e) An individual who is eligible to make deposit to OPM shall submit an application to make deposit, accompanied by a copy of his or her DD 214(s) or its (their) equivalent(s), as well as sufficient evidence of basic pay, if available, or a statement of estimated earnings, to OPM.

831.2107 Payments on deposits.

(a) Deposits made to agencies, the Clerk of the House of Representatives or the Secretary of the Senate.

(1) Deposits made to agencies, the Clerk of the House of Representatives or the Secretary of the Senate shall be collected in full in one lump sum whenever this is possible. Notwithstanding the provisions of paragraph (a)(2) of this section, a separated employee who, through administrative error, did not make or complete the deposit prior to his or her separation must complete the deposit in a lump sum within the time limit set by OPM when it rules that an administrative error has been made.

(2) If the employee or Member cannot make payment in a lump sum, the agency, the Clerk of the House of Representatives, or the Secretary of the Senate shall accept installment payments (by allotments or otherwise). However, agencies, the Clerk of the House of Representatives, and the Secretary of the Senate will not be required to accept individual checks in amounts of less than $50.

(3) If the employee or Member dies, the employing agency, the Clerk of the House of Representatives or the Secretary of the Senate shall advise the survivor of the right to make or complete a deposit. If the survivor decides to make or complete the payment, the agency, the Clerk of the House of Representatives, or the Secretary of the Senate shall collect the amount due in one lump sum.

(4) Payments received by the employing agency, the Clerk of the House of Representatives, or the Secretary of the Senate shall be remitted immediately to OPM for deposit to the Fund.

(5) Once the employee's, Member's, or survivor's deposit has been paid in full or closed out, the employing agency, the Clerk of the House of Representatives, or the Secretary of the Senate shall submit documentation pertaining to the deposit to OPM, in accordance with instructions published in the Federal Personnel Manual.

(6) Deposits must be made for full periods of service.

(b) Deposits made to OPM.

(1) Deposits made to OPM shall be made in a lump sum prior to final adjudication of the application for retirement or survivor benefits.

(2) Deposits must be made for full periods of service.

[48 FR 38788, Aug 26, 1983, as amended at 49 FR 20631, May 16, 1984]

Title 28, Appendix - Rules of Appellate Procedures

Title VII - General Provisions

Rule 28. Briefs.

(a) *Appellant's Brief.* - The brief of the appellant must contain, under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis.

(3) A statement of the issues presented for review.

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement

of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

(6) An argument. The argument must contain the conditions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

(7) A short conclusion stating the precise relief sought.

(b) *Appellee's Brief.* - The brief of the appellee must conform to the requirements of paragraphs (a)(1)-(6), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;
(2) the statement of the issues;
(3) the statement of the case;
(4) the statement of the standard of review.

(c) *Reply brief.* - The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

(d) *References in briefs to parties*. - Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

(e) *References in briefs to the record.* - References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see (Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript, at which the evidence was identified, offered, and received or rejected.

(f) *Reproduction of statutes, rules, regulations, etc.* - If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) *Length of briefs.* - Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.

(h) *Briefs in cases involving cross appeals.* - If a cross appeal is filed, the party who first files a notice of appeal, or in the event that the notices are filed on the same day, the plaintiff in the proceeding below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(6) of this rule with respect to the appellee's cross appeal as well as respond to the brief of the appellant except that a statement of the case need not be made unless that appellee is dissatisfied with the statement of the appellant.

(i) *Briefs in cases involving multiple appellants and appellees*. - In cases involving more than one appellant or appellee, including cased consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) *Citation of supplemental authorities*. - When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(As amended Apr. 30 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994)

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42 USC 2000e-5 - Enforcement Provisions

(a) Power of Commission to prevent unlawful employment practices.

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause.

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is a reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the supplication of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. the person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, ro the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within

ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purpose of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any jurisdictional district in the State in which the unlawful employment practice is

alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable data and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and united States for costs

If any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(Pub. L. 88-352, title VII, 706, July 2, 1964, 78 Stat. 259; Pub. L. 92-261, 4, Mar. 42, 1972, 86 Stat. 104; Pub. L. 102-166, title I, 107(b), 112, 113(b), Nov. 21, 1991, 105 Stat. 1075, 1078, 1979.)

Order and Recommendation of the Magistrate Judge, dated September 24, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

RAYMOND JACKSON,)
Plaintiff,)
vs.) CIVIL ACTION 97-D-1223-N
JAMES B. KING, Director)
of the Office of Personnel)

Management, Et AL.,)
Defendants.)

ORDER AND RECOMMENDATION OF THE MAGISTRATE JUDGE

On February 25, 1998, the court entered an order staying discovery in this action pending its resolution of the disposition motion filed by defendants.[1] On March 30, 1998, plaintiff moved to lift the stay of discovery (Doc. #45). The court has not granted the motion to lift the stay. Plaintiff has nevertheless filed a number of motions seeking relief for defendant's failure to respond to discovery propounded by plaintiff: (1) a motion for order compelling discovery, filed May 11, 1998 (Doc. #55); (2) a motion for order of civil contempt and sanctions, filed July 17, 1998 (Doc. #64); (3) a motion for order compelling discovery, filed July 17, 1998 (Doc. #65); and (4) a motion for entry of default judgment against federal defendants [for failure to provide discovery], filed August 3, 1998 (Docs. ##66, 67). In granting the stay, the court concluded that it was appropriate to relieve the defendants of the burden of responding to discovery, pending the court's ruling on defendants's motion. That conclusion has not changed. According, the court will deny plaintiff's motion to lift the stay, and will deny plaintiff's motions seeking relief for defendants' failure to respond to discovery requests. Further, the court will recommend to the district judge that plaintiff's motion for civil contempt and sanctions (Doc. #64), and his motions for entry of default judgment (Docs. ##66, 67) be denied.

Plaintiff has also filed a motion to compel the federal defendants to pay the plaintiff all back pay due to unjustified personnel actions (Doc #58), a motion to compel defendant King to process plaintiff's application to make a deposit to the civil service retirement system (Doc. #40), a motion to compel defendants to comply with statutory directives and declare plaintiff's retirement a nullity and reinstate plaintiff (Doc. #43), and a motion to compel defendant King to refund all of plaintiff's improperly withheld civil service retirement pension (Doc. #41). By recommendation entered contemporaneously with this order, the court has concluded that plaintiff may not maintain this action, and that it is due to be dismissed. Accordingly, these motions for relief will be denied without prejudice.

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[1] Discovery was not stayed in this action until after plaintiff had responded to defendants' dispositive motion.

Additionally, the court has considered plaintiff's motion for joinder of persons needed for just adjudication (Doc. #47), and his motions to amend the complaint (Docs. #48, 49, 54). The court concludes that the permitting joinder of the Chairman of the Merit Systems Protection Board and allowing plaintiff's amendments would not change this court's recommendation that the action be dismissed and, accordingly, would be futile. See Grayson v. K-Mart Corporation, 79 F.3d 1086, 1110 (11th Cir. 1996) ("In determining whether to grant leave to amend, a court may consider undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and the futility of the amendment.") (citations omitted). Therefore, the motions will be denied.

Plaintiff and defendants agreed to a time for a face-to-face settlement conference. Defendants' counsel did not appear at the scheduled time. As a result, plaintiff has filed a motion for sanctions against defendants (Doc. #63). Defendants' counsel has apologized to plaintiff for missing the conference, citing a calendaring error for the failure. (ltr. to plaintiff, July 1, 1998). While the court does not condone counsel's failure to attend the scheduled meeting, the court does not find sanctions to be warranted. Accordingly, the undersigned will recommend that the motion for sanctions be denied.

Plaintiff has also filed an "emergency motion" to compel defendant King to make retirement annuity deposits to plaintiff's account (Doc. #68). Plaintiff asserts that he should have received monthly deposits of $1036.61 each on July 1, 1998 and August 1, 1998, and that OPM's failure to make the deposits is in retaliation for plaintiff's having filed the present lawsuit. He alleges that, although he has requested replacement checks, OPM has refused to issue them. Plaintiff's complaint does not, however, include a retaliation claim, nor has plaintiff moved to amend his complaint to include such a complaint. Accordingly, the motion will be denied.

Upon consideration of the above motions, and for good cause, it is

ORDERED that plaintiff's motions (Docs. ##40, 41, 43, 45, 47-49, 54, 55, 58, 65, 68) are DENIED. It is further ORDERED that defendants' motion for clarification filed May 21, 1998 (Doc #57) is GRANTED. In the event that the District Judge does not dismiss this action, the court will enter an order establishing new deadlines for discovery and filing dispositive motions.

Further it is the RECOMMENDATION of the Magistrate Judge that plaintiff's motions for orders of civil contempt and sanctions (Docs. #363, 64) and his motion for default judgment (Docs. #66, 67) be DENIED.

DONE, this 24th day of September, 1998.

s/SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

CIVIL ACTION NO. 97-D-1223-N

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982). See Stein v. Reynolds Securities, Inc., 667 F.2d 33(11th Cir. 1982). See also Bonner v. City of Prichard 661 F. 2d 1206 (11th Cir. 1981, en banc)), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 2th day of September, 1998.

s/SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

(Cite as: 205 F.3d 1354)
Jackson
v.
King [FN*]

NO. 98-6992

United States Court of Appeals,
Eleventh Circuit
December 28, 1999
Appeal From: M.D.Ala., No. 97-01223-CV-D-N

Affirmed.

FN*.Fed.R.App.P.34(a); 11th Cir.R. 34-3.
(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is

attached to or incorporated within the brief, petition.
(Cite as: 205 F.3d 1354)
or motion. Eleventh Circuit Rules, Rule 36-2, 28 U.S.C.A.)

C.A. 11 1999.
Jackson v. King
END OF DOCUMENT

U. S. Equal Employment Opportunity Commission's Petition No. 03970105/MSPB No. AT-0831-97-0206-T-1, Raymond Jackson, Petitioner v. James B. King, Director, Office of Personnel Management Agency, dated July 7, 1997

U.S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

RAYMOND JACKSON,)
Petitioner,)
vs.) Petition No. 03970105
JAMES B. KING, Director)
Office of Personnel MSPB No. AT- 0831-97-0206-I-1
Management,)
Agency)
)

DECISION

INTRODUCTION

On May 8, 1997, Raymond Jackson (hereinafter referred to as petitioner) timely filed a petition with the Equal Employment Opportunity Commission (the Commission) for review of the Merit Systems Protection Board (the Board) final decision on his case. In that decision, the Board found that the agency had not discriminated against him on the bases of his race (black), sex, and age (63) when it reduced his monthly retirement annuity to exclude his post 1956 military service until such time as he made the proper deposit to obtain that service credit. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. 621 et seq. The Commission accepts this petition in accordance with the Civil Service Reform Act of 1978 and EEOC Regulations at 29 C.F.R., 1614.303 et seq. .

Petitioner has filed the instant petition with the Commission seeking review of the Board's finding of no discrimination. In addition, the record indicates that petitioner filed a civil action in the United States Court of Appeals for the Federal Circuit (Civil Action No. 97-3331), seeking review of the Board's Order affirming the Initial Decision. Further, the Commission was informed that as of June 20, 1997, the civil action remains pending.

When a civil action is filed raising the same claim(s) adjudicated by the Board, the Commission will cease processing petitioner's petition for review. According, EEOC Petition No. 03970105 is hereby dismissed. See Hickman v. U.S. Postal Service, EEOC Petition No. 03930015 (March 10, 1993).

STATEMENT OF PETITIONER'S RIGHTS
RIGHT TO FILE A CIVIL ACTION (W1092)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, WITHIN THIRTY (30) CALENDAR DAYS of the date that you receive this decision. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:
s/Ronnie Blumenthal, Director
Office of Federal Operations
Jul 07 1997

Petitioner's Statement Concerning Discrimination in United States Court of Appeals for the Federal Circuit, dated 5/21/97.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JACKSON V. OPM
No. 97-3331

Petitioner's Statement Concerning Discrimination

(INSTRUCTIONS: Select only one of the following statements. Do not alter or add to any of the statements.)

_____ (1) No claim of discrimination by reason of race, sex, age, national origin or handicapped condition has been or will be made in this case.

_____ (2) Any claim of discrimination by reason of race, sex, age, national origin, or handicapped condition raised before the employing agency or the Merit Systems Protection Board has been abandoned and will not be raised or continued in this or any other court.

_____ (3) The petition seeks review only of the Merit Systems Protection Board's dismissal of the case for lack of jurisdiction or for untimeliness.

Also answer the following: Have you filed a discrimination case in a United States district court? NO In the Equal Employment Opportunity Commission? YES If so, identify each case. Use extra sheets if needed.

MSPB No. : ATO 831970206I1/EEOC Docket No. 03970105
Recd Date: 051397, Jackson v. Ofc of Personnel Management

5/21/97

s/Raymond Jackson, Petitioner's Signature

Mail this form with the petition for review to:

Clerk
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

If your case involved the application for benefits in the Office of Personnel Management or is a contested transfer by a district court, then you do not have to check one of the statements listed above. Rather, you should check one of the following statements.

__X__ (1) My case involved the application for benefits in the Office of Personnel Management.

_____ (2) My case was transferred to this court from a district court, and I continue to contest the transfer.

---

225 Conrad Street
Montgomery, AL 36110-1303
October 23, 1998

Office o f Review and Appeals
Equal Employment Opportunity Commission (EEOC)
P. O. Box 19848
Washington, DC 20036

Raymond Jackson, Petitioner v. Office of Personnel Management, United States Army, Merit Systems Protection Board, Respondents.

Request for Correction of Administrative Errors and Reconsideration of Petitioner's "Notice of Petition to the EEOC from Merit Systems Protection Board (MSPB) Decision on a Mixed Case Appeal and Complaint of Prohibited Race (Black), Sex (Male) and Age (62) Discrimination, In The Case of Raymond Jackson, 423-42-1287, Petitioner", dated May 8, 1997.

The EEOC's Decision on Petition No. 03970105/MSPB No. AT-0831-97-0206-I-1, Raymond Jackson, Petitioner, v. James B. King, Director, Office of Personnel Management, Agency, dated July 7, 1997, is at exhibit 1.

Pursuant to 29 CFR Ch. XIV (1/1/98 Edition) 1614.407, Petitioner URGENTLY requests the EEOC to correct the following administrative errors in its decision, exhibit 1, and reconsider EEOC's Decision on Petition No. 03970105/MSPB No. AT-0831-

97-0206-I-1 on grounds set forth below:

I. ADMINISTRATIVE ERROR #1: Lines 2 to 8, paragraph 2 of exhibit 1 states that "In addition, the record indicates that petitioner filed a civil action in the United States Court of Appeals for the Federal Circuit (Civil Action No. 97-3331), seeking review of the Board's Order affirming the Initial Decision. Further, the Commission was informed that as of June 20, 1997, the civil action remains pending."

I(a). GROUNDS

1. The EEOC's 7/7/97 decision, exhibit 1, failed to notify petitioner of his regulatory right to file a timely request for reconsideration of EEOC's 7/7/97 decision pursuant to 29 CFR Ch. XIV (7/1/98 Edition) 1614.407 - Reconsideration, within 30 days of receipt of EEOC's 7/7/97 decision, which perpetrated upon petitioner a Harmful Error - i.e., error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error (lines 1 to 6, 5 CFR Ch. II (1/1/98 Edition) 1201.56(c)(3) - Definitions). The Harmful Error caused substantial harm or prejudice to plaintiff's rights by arbitrarily and capriciously denying plaintiff's due process, regulatory and statutory rights under the civil Service Reform Act of 1978 and EEOC, Regulations at 29 CFR 6114.303 et seq., and causing EEOC petition no. 03970105 to be arbitrarily and capriciously dismissed.
2. 29 CFR Ch. XIV (7/1/98 Edition) 1614.419 - Effect of Filing A civil Action (lines 1 to 3) states that "Filing a Civil Action under 29 Ch. XIV (7/1/98 Edition) 1614.408 - Civil Action: Title VII, Age Discrimination in Employment Act and

Rehabilitation Act or 29 CFR Ch. XIV (7/1/98 Edition) 1614.409 - Civil Action: Equal Pay Act shall terminate Commission processing of appeal".

3. Appeal (Legal Definition): Resort to a superior (i.e. appellate) court to review the decision of an inferior (i.e., trial) court or administrative agency. A complaint to a higher tribunal of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed. Board of Ed. of Cleveland City School District v. Cuyahoga County Bd. of Revision, 34 Ohio St. 2d 231, 298 N.E. 2d 125, 128 (Black's Law Dictionary, Sixth Edition, Centennial Edition (1891-1991)). It is a well-established legal fact that appeals are filed in appellate courts.

4. Civil Action (Legal Definition): Action brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings. Gilliken v. Gilliken, 248 N.C. 710, 104 S.E. 2d 861, 863 (Black's Law Dictionary, Sixth Edition, Centennial Edition (1891-1991)). It is a well-established legal fact that Civil Actions are filed in district courts (Rule 2 of Federal Rules of Civil Procedure).

5. The United States Court of Appeals for the Federal Circuit is an appellate court, as shown by the mandate issued in case number 97-3331, exhibit 2. That is the PROOF that case number 97-3331 is AN APPEAL, NOT A CIVIL ACTION, AS ANY RECORD MIGHT HAVE INDICATED. The allegation that "petitioner's filed a civil action in the United States Court of Appeals for the Federal Circuit (civil action no. 97-3331)" (see paragraph I. above) perpetrated upon petitioner, a Harmful Error - i.e., Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one

it would have reached in the absence or cure of the error (lines 1 to 6, 5 CFR Ch. II (1/1/98 Edition) 1201.56(c)(3) Definitions). The Harmful Error caused substantial harm or prejudice to plaintiff's rights by arbitrarily and capriciously denying plaintiff's due process, regulatory and statutory rights under the Civil Service Reform Act of 1978 and EEOC Regulations at 29 CFR 1614.303 et seq., and causing EEOC petition No. 03970105 to be arbitrarily and capriciously dismissed.

6. The previous decision, exhibit 1, involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy (29 CFR 1614.407(c)(2)).
7. The decision, exhibit 1, is of such exceptional nature as to have a substantial precedential implications (29 CFR 1614.407(c)(3)).
8. The evidence clearly shows that the Office of Personnel Management, United States Army and the Merit Systems Protection Board perpetrated prohibited race (Black), sex (male, and age (62) discrimination against the petitioner.

II. ADMINISTRATIVE ERROR #2: Paragraph 3 of exhibit 1 states that "when a civil action is filed raising the same claim(s) adjudicated by the Board, the Commission will cease processing petitioner's petition for review. Accordingly, EEOC Petition No. 03970105 is hereby dismissed. See Hickman v. U.S. Postal Service, EEOC Petition No. 03930015 (March 10, 1993).

Iia) GROUNDS

1. Petitioner's appeal from the Merit Systems Protection Board in case number AT0831970206-I-1, to United States Court of Appeals for the Federal Circuit, as case number 97-3331, is NOT A CIVIL ACTION as alleged in paragraph II above. Therefore, the allegation (i.e., paragraph II above) is contrary to the truth.

2. The claim(s) raised by petitioner's appeal from the Merit Systems Protection Board in case number AT 0831970206-I-1, to United States Court of Appeals for the Federal Circuit, as case number 97-3331 "Involved the Application for benefits in the Office of Personnel Management", as stated in exhibit 3. The claim(s) raised in EEOC petition No. 03970105 are prohibited race (Black), sex (male and age (62) discrimination issues". Consequently, the allegation that "the same claim(s) adjudicated by the Board was raised in the civil action" (see paragraph II above) has perpetrated upon petitioner a Harmful Error i.e., error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error (lines 1 to 6, 5 CFR Ch. II (1/1/98 Edition) 1201.56(c)(3) - Definitions). The Harmful Error caused substantial harm or prejudice to plaintiff's rights by arbitrarily and capriciously denying plaintiff's due process, regulatory and statutory rights under the Civil Service Reform Act of 1978 and EEOC Regulations at 29 CFR 1614.303 et.seqs, and causing EEOC petition No. 03970105 to be arbitrarily and capriciously dismissed.
3. The previous decision, exhibit 1, involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy (29 CFR 1614.407(c)(2)).
4. The decision, exhibit 1, is of such exceptional nature as to have substantial precedential implications (29 CFR 1614.407(c)(3)).
5. The evidence clearly shows that the Office of Personnel Management, United States Army and the Merit Systems Protection Board perpetrated prohibited race (Black), sex (male), and age (62)

discrimination against the petitioner.

This request for reconsideration of EEOC Petition NO. 03970105 should be granted on grounds cited at paragraphs I and II and to promote substantial justice.

Sincerely,

s/Raymond Jackson
225 Conrad Street
Montgomery, AL 36110-1303
423-42-1287
(334) 265-8801

Date: 10/23/98
3 Exhibits

United States Court of Appeals for the Federal Circuit
97-3331
RAYMOND JACKSON,
Petitioner
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in Case No(S). AT0831970206-I-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED Dec 10 1997 s/Jan Horbaly, Clerk

ISSUED AS A MANDATE: Feb 2 1998

UNITED STATES COURT OF APPEALS FOR THE FEDERAL

CIRCUIT

JACKSON V. OPM
No. 97-3331

Petitioner's Statement Concerning Discrimination

(INSTRUCTIONS: Select only one of the following statements. Do not alter or add to any of the statements.)

_____ (1) No claim of discrimination by reason of race, sex, age, national origin or handicapped condition has been or will be made in this case.

_____ (2) Any claim of discrimination by reason of race, sex, age, national origin, or handicapped condition raised before the employing agency or the Merit Systems Protection Board has been abandoned and will not be raised or continued in this or any other court.

_____ (3) The petition seeks review only of the Merit Systems Protection Board's dismissal of the case for lack of jurisdiction or for untimeliness.

Also answer the following: Have you filed a discrimination case in a United States district court? NO In the Equal Employment Opportunity Commission? YES If so, identify each case. Use extra sheets if needed.

MSPB No. : ATO 831970206I1/EEOC Docket No. 03970105
Recd Date: 051397, Jackson v. Ofc of Personnel Management
5/21/97
s/Raymond Jackson, Petitioner's Signature
Mail this form with the petition for review to:

Clerk
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

If your case involved the application for benefits in the Office of Personnel Management or is a contested transfer by a district court, then you do not have to check one of the statements listed above. Rather, you should check one of the following statements.

__x__ (1) My case involved the application for benefits in the Office of Personnel Management.

_____ (2) My case was transferred to this court from a district court, and I continue to contest the transfer.

CERTIFICATE OF SERVICE

On October 23, 1998, a copy of petitioner's Request for Correction of Administrative Errors and Reconsideration of Petitioner's "Notice of Petition to the EEOC from Merit Systems Protection Board (MSPB) Decision on A Mixed Case Appeal and Complaint of Prohibited Race (Black), Sex (Male), and Age (62) Discrimination, In the Case of Raymond Jackson, 423-42-1287, Petitioner, dated May 8, 1997", dated October 23, 1998, was mailed via certified first class prepaid postage to:

1. Office of Review and Appeals
   Equal Employment Opportunity Commission (EEOC)
   P. O. Box 19848
   Washington, DC 20036
2. James B. King, Director
   Office of Personnel Management Agency
   1900 E Street, NW, Room 5A09
   Washington, DC 20415
3. Robert M. Walker
   Acting Secretary of the Army
   Room 3E700, Pentagon Building
   Washington, DC 20415
4. Ben L. Erdreich
   Chairman, Merit Systems Protection Board
   1120 Vermont Avenue, NW
   Washington, DC 20419

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

s/Raymond Jackson
225 Conrad Street
Montgomery, AL 36110-1303
(334) 265-8801
423-42-1287
Date: 10/23/98

Initial Decision of United States of America Merit Systems Protection Board, Atlanta Regional Office, Docket Number # AT-0831-97-0206-I-1, Raymond Jackson, Appellant v. Office of Personnel Management, Agency (CSA 3059121), dated March 11, 1997.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

RAYMOND JACKSON,)
Appellant,) DOCKET NUMBER
vs.) AT-0831-97-0206-I-1
)
Office of Personnel Management) DATE: Mar 11 1997
Agency.)
(CSA 3 059 121))

Raymond Jackson, Montgomery, Alabama, pro se.
John Pearson, Washington, DC, for the agency.

BEFORE
Margaret S. Cunningham
Administrative Judge

INITIAL DECISION

INTRODUCTION

On November 23, 1996, appellant filed a timely appeal with the Board's Atlanta Regional Office from an October 21, 1996 reconsideration decision issued by the Office of Personnel Management (OPM) finding that his monthly retirement annuity was properly reduced to exclude appellant's post-1956 military service until such time as he made the proper deposit to obtain that service credit. The Board as jurisdiction over this appeal. See 5 USC 8347(d); 5 CFR 831.110.

Sine appellant did not request a hearing, this decision is based on the written submissions of the parties. See 5 CFR 1201.58(b). For the reasons discussed below, OPM's reconsideration decision is AFFIRMED.

ANALYSIS AND FINDINGS

Appellant retired from Federal civilian service on April 1, 1988. On February 1, 1996, OPM notified him that he had become eligible for Social Security's Old Age and Survivors Insurance (OASI) benefits on account of his post-1956 military service and that his monthly retirement annuity would be reduced to reflect that eligibility inasmuch as appellant had not made the required deposit for his post-1956 military service. Appellant sought reconsideration of that determination. Thereafter, on October 3, 1996, OPM wrote appellant a letter advising him that it had correctly determined that his annuity should be reduced but afforded him an opportunity to make his post-1956 deposit. Subsequently, on October 21, 1996, OPM issued its reconsideration decision affirming its prior determination and again informing appellant that he could still make the deposit.

On appeal to the board, appellant contends that his annuity should be returned to its higher level and that he should not be required to make any deposit whatsoever.

Appellant bears the burden of proving by preponderant evidence that he is entitled to the benefit he seeks, i.e., the higher annuity without being required to make a deposit for his post 1956 military earnings. Brown v. Office of Personnel Management, 9 MSPR 122, 125 (1981).

Under Pub. L. No. 97-253, 96 Stat. 763 (effective October 1, 1982), a civil service annuitant who retired after September 7, 1982, is entitled to credit for active duty military service performed after 1956 under both the Civil Service Retirement and Social Security systems, but only if he deposits with the Civil Service Retirement Fund a sum equal to 7 percent of his total post-1956 military pay. See Holtermann v. Office of Personnel Management, 57 MSPR 380, 383 (1993); 5 USC 8332(j)(1), 8334(j). If an annuitant subject to Pub. L. No. 97-253 does not make a deposit, OPM must recompute his annuity payment., excluding credit for post 1956 military service, when the annuitant becomes eligible for Social Security benefits. Id.

Under the initial regulations implementing Pub. L. No. 97-253, an individual who wished to make a deposit was required to make payment to his or her employing agency prior to separation. See Holtermann, 57 MSPR at 383 (citing 47 Fed. Reg 43634 (October 1, 1982)). OPM has twice amended its regulation. It first amended the regulation in order to allow individuals who had retired after September 8, 1982, and before October 1, 1983, to remit a deposit to OPM after separation. See 5 CFR 831.2104(b). OPM explained that the amendment was made in order to avoid any hardship for individuals who retired without opportunity to make a deposit, or for employees who retired before employing agencies could implement the provisions to accept deposits for military service. Holtermann, 57 MSPR at 383. OPM amended its regulations a second time, effective October 1, 1983, in recognition of the fact that, because of administrative error or misleading advice, some individuals had not been given an opportunity to make a deposit prior to separation. Id. Under the latter amendment, such an individual would be permitted to make a lump-sum deposit, regardless of his separation date, if he failed to make the deposit prior to separation from service due to administrative error. See 5 CFR 2104(a).

An appellant who retired after October 1, 1983, is entitled to make a 7 percent deposit after retirement if he can establish that he failed to make the deposit prior to his separation due to administrative error. In this instant case, however, OPM has already found that, due to administrative error, appellant should be allowed to make the deposit. Thus, the only issue before me is whether such deposit requirement can be waived. Based on my review of pertinent law, rule, and regulation, the deposit requirement cannot be waived.

Although appellant submitted a voluminous record on appeal, and cited various statutes and regulations, he points to nothing that allows a waiver of the deposit requirement. Indeed, it appears that appellant completely misunderstands that statutes he is citing. Additionally, I am unaware of any statute or regulation that permits such a waiver. Accordingly, I conclude that the agency properly reduced appellant's annuity once he became entitled to OASI benefits and its determination that appellant must make a deposit if he wishes to receive the larger annuity is not incorrect. If appellant wants to have his annuity increased, he must comply with OPM's directions concerning the amount and time of payment of the deposit. If he fails to comply, he will continue to receive the lowered annuity amount.

On appeal to the Board, appellant appears to be making the argument that he should be given additional credit for military service. It is not clear from the record the context in which appellant raised that issue to OPM inasmuch as he raised a significant number of issues since his retirement. In any event, that issue is not addressed in any of OPM's determinations in this case. Since the Board only has jurisdiction over issues addressed in OPM's reconsideration decisions, I do not have jurisdiction to adjudicate appellant's service credit allegations. See Lewis v. Office of personnel Management, 69 MSPR 395, 397-98 (1996). Appellant may seek a separate determination from OPM concerning his service credit.

Appellant also raised the issues of sex and race discrimination and whistleblowing. However, since he has presented no facts in support of those claims, I reject them out of hand as claims with respect to which appellant has not even made out a prima facie case.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD:
s/MARGARET S. CUNNINGHAM
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on Apr 15 1997, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

Title 28, Appendix - Rules of Appellate Procedure

Rule 43. Substitution of Parties

(a) *Death of a party.* - If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

(b) *Substitution for other causes.* If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision(a).

(c) *Public officers; death or separation from office.* (1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer's official title rather than by name; but the court may require the public officer's name to be added.

(As amended Mar. 10, 1986, eff. July 1, 1986).

Supreme Court Rule 35

Death, Substitution, and Revivor; Public Officers

1. If a party dies after the filing of a petition for a writ of certiorari to this Court, or after the filing of a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, and other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that court's jurisdiction, proceedings will be concluded as this Court may direct.

3. When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. The parties shall notify the Clerk in writing of any such successions.

Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded.

4. A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officers official title rather than by name, but the Court may require the name to be added.

---

5 USC 7702. Actions Involving Discrimination.

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by

(i) section 717 of the Civil Rights Act of 1964 (42 USC 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 USC 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 USC 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 USC 631, 633a) or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves

(A) any action described in paragraph (1)(A) of this subsection; and

(B) and issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve each matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable section as of -

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either -

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law -

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or

provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision, and -

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole -

(i) reaffirm the initial decision of the Board; or

(b) An employee against whom an action covered by this subchapter is proposed is entitled to-

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, stating specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and specific reasons therefore at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, and a summary thereof when made orally, the notice of decision and reasons therefore, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

(Added Pub. L. 95-454. title IV. 411(2), Oct. 13, 1978, 92 Stat. 1174; amended Pub. L. 97-35, title XVII. 1740(d)(2), Aug. 13, 1981, 95 Stat 758; Pub. L. 98-615, title III, 304(c), Nov 8, 1984, 98 Stat. 3219.)

AMENDMENTS

1984 - Subsec. (a). Pub. L. 98-615 inserted reference to failure to accept a directed reassignment or to accompany a position in a transfer of function.

1981 - Subsec. (a). Pub L. 97-35 substituted "misconduct, neglect of duty, or malfeasance", for "such cause as will promote the efficiency of the service".

EFFECTIVE DATE of 1984 AMENDMENT

Amendment by Pub L. 98-615 effective Nov 8, 1984, see section 307 of Pub L. 98-615, set out as a note under section 3135 of this title.

EFFECTIVE DATE of 1981 AMENDMENT

Amendment by Pub L. 97-35 effective June 1, 1981 with certain exceptions and conditions, see section 1704(e) of Pub L. 97-35, set out as an Effective note under section 3595 of this title.

United States Code Annotated, Title 28, Federal Rules of Appellate Procedure, Rule 34.

Oral Argument/Rule 34(a).

In general; local rule, states that "oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authority decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Title 28, Appendix - Rules of Civil Procedure

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug 1, 1987.)

Title 28, Appendix - Rules of Civil Procedure

Rule 21. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

NOTES OF ADVISORY COMMITTEE on RULES - 1937

See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 11. See also (former Equity Rules 43 (Defect of Parties - Resisting Objection) and 44 (Defect of Parties -

Tardy Objection).

For separate trials see Rules 13(i) (Counterclaims and Cross-Claims:; Separate Trials; Separate Judgments), 20(b) (Permissive Joinder of Parties: Separate Trials), and 42(b) (Separate Trials, generally) and the note to the latter rule.

CROSS REFERENCES

Collusive and improper joinder of parties, jurisdiction of district courts, see action 1359 of this title.

Intervention of parties, see rule 44.

Necessary joinder of parties, see rule 19.

Permissive joinder of parties, see rule 20.

Removal of causes, realignment of parties, see section 1447 of this title.

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5 USC 7701. Appellate Procedures.

(a) An employee, or applicant for employment, may submit an appeal to the merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right - (1) to a hearing for which a transcript will be kept; and (2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (3), unless - (i) the deciding official determines that the granting of such relief is not appropriate, or (ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present a the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of the paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of Chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision - (A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a, is supported by substantial evidence; or (B) in any other case, is supported by a preponderance of the evidence.

(2) Nothwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment -

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which - (A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office; the Director may as a matter of right, intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section. (e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless -

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. (f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may

(1) consolidate appeals filled by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently.

If the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party. (g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 USC 2000e-5(k)). (h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section. (i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete

action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefore.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding. (j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account. (k) The Board may prescribe regulations to carry out the purpose of this section.

(Pub. L. 89-554, Sept, 6, 1966, 80 Stat. 530; Pub L. 95-454, title II, 205, Oct. 13, 1978, 92 Stat 1138; Pub L 96-54, 2(a)(45), Aug. 14 1979, 93 Stat 384; Pub L 99-386, title II, 208, Aug. 22, 1986, 100 Stat 824; Pub L 101-12, 6. Apr. 10, 1989, 103 Stat 33; Pub L. 101-194, title V, 506(b)(6), Nov. 30, 1989, 103 Stat. 1758; Pub L 101-280, 6(d)(2), May 4, 1990, 104 Stat. 160; Pub L. 101-376, 3, Aug. 17, 1990, 104 Stat. 462; Pub. L. 102-175, 5, Dec. 2, 1991, 105 Stat. 1223; Pub. L. 102-378, 2(56), Oct. 2, 1992, 106 Stat. 1354.

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29 CFR Ch. XIV (7/1/99 Edition) Equal Employment Commission 1614.310, Right to File a Civil Action

An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 USC

7702 to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

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29 USC 206 Labor-Minimum Wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $3.35 an hour during the period ending March 31, 1990, not less than $3.80 an hour during the year beginning April 1, 1990, and not less than $4.25 an hour after March 31, 1991;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined: to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to beg produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b)

of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint pursuant to sections 205 and 208 of this title. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966; title IX of the Education Amendments of 1972 (20 USC 1681 et seq.), or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

(c) Employees in Puerto Rico

(1) The rate or rates provided by subsection (a)(1) of this section shall be applicable in the case of any employee in Puerto Rico who is employed by- (A) the United States, (B) an establishment that is a hotel, motel, or restaurant, (C) any other

retail or service establishment that employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs, or (D) any other industry in which the average hourly wage is greater than or equal to $4.65 an hour.

(2) In the case of any employee in Puerto Rico who is employed in an industry in which the average hourly wage is not less than $4.00 but not more than $4.64, the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1, thereafter through April 1, 1994, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) of this section shall apply on April 1, 1994.

(3) In the case of an employee in Puerto Rico who is employed in an industry in which the average hourly wage is less than $4.00, except as provided in paragraph (4), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter April 1, 1995, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) of this section shall apply on April 1, 1995.

(4) In the case of any employee of the Commonwealth of Puerto Rico, or a municipality or other governmental entity of the Commonwealth, in which the average hourly wage is less than $4.00 an hour and who was brought under the coverage of this section pursuant to an amendment made by the Fair Labor Standards Amendments of 1985 (Public Law 99-150), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1996, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) of this section shall apply on April 1, 1996.

(d) Prohibition of sex discrimination.

(1) No employer having employees subject to any provisions of this section shall discriminate, within any

establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States

(1) Nothwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 USC 351-357) or to whom subsection (a)(1) of this section is not applicable,

wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1964 [4] USC 351 et seq.] every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b) of this section, except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Employees in domestic service

Any employee -

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act [42 USC 409(a)(6)] constitute wages for the purposes of title II of such Act [42 USC 401 et seq.], or

(2) who in any workweek -

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate., shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

(June 25, 1938, ch. 676, 6, 52 Stat. 1062; June 26, 1940, ch 432, 3(e), (f), 54 Stat. 616; Oct 26, 1949, ch 736, 6, 63 Stat. 912; Aug. 12, 1955, ch, 867, 3, 69 Stat. 711; Aug. 8, 1956, ch. 1035, 2, 70 Stat. 1118; May 5, 1961, Pub. L. 87-30, 5, 75 Stat. 67; June 10, 1963, Pub. L. 88-38, 3, 77 Stat. 56; Sept. 23, 1966, Pub.

L. 89-601, title III, 301-305, 80 Stat. 838, 839, 841; Apr. 8, 1974, Pub. L. 93-259, 2-4, 5(b), 7(b)(1), 88 Stat. 55, 56, 62; Nov. 1, 1977, Pub. L. 95-151, 2(a)-(d)(2), 91 Stat. 1245, 1245; Nov. 17, 1989, Pub. L. 101-157, 2, 4(b), 103 Stat. 938, 940; Dec. 19, 1989, Pub. L. 101-239, title X, 10208(d)(2)(B)(i), 103 Stat 2481.)

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42 USC 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall -

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to - (1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and (2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, ro by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(Pub. L. 88-352, title VII, 717, as added Pub. L. 92-261, 11, Mar. 24, 1972, 86 Stat. 111; amended 1978 Reorg. Plan No. 1, 3, eff. Jan 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub. L. 96-191, 8(g), Feb. 15, 1980, 94 Stat. 34; Pub. L 102-166, title I, 114, Nov. 21, 1991, 105 Stat. 1079.)

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29 USC 791 - Labor - Employment of Individuals with Disabilities

(a) Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereinafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the

Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

9b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eight days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, of instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities fir individuals with disabilities.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of People with Disabilities, special consideration shall be given to qualified individuals with disabilities.

(g) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 USC 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42

USC 12201-12204 and 12210), as such sections relate to employment.

(Pub. L. 93-112, title V, 501, Sept. 26, 1973, 87 Stat. 390; Pub. L. 98-221, title I, 104(b)(3), Feb. 22, 1984, 98 Stat. 18; Pub. L. 99-506, title I, 103(d)(2)(C), title X, 1001(f)(1), 1002(e)(1), (2)(A), Oct. 21, 1986, 100 Stat. 1810, 1843, 1844; Pub. L. 100-630, title II, 206(a), Nov. 7, 1988, 102 Stat. 3310; Pub.. L. 102-54; 13(k)(1)(B), June 13, 1991, 105 Stat. 276; Pub. L. 102-569, title I, 102(p)(29), title V, 503, Oct. 29, 1992, 106 Stat. 4360, 4424; Pub. L. 103-73, title I, 112(a), Aug. 11, 1993, 107 (Stat. 727.)

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29 USC 633a. Nondiscrimination on account of age in Federal Government Employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission; compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions, bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall -

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection 9a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age. The head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Governmental agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission: scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978 and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

(Pub. L. 90-202, 15, as added Pub. L. 93-259, 28(b)(2), Apr. 28, 1974, 88 Stat. 74; amended Pub. L. 95-256, 5(a), (e), Apr. 6, 1978, 92 Stat. 191; 1978 Reorg. Plan No. 1. eff. Jan. 1, 1979, 2, 43 FR 19807, 92 Stat. 3781.)

United States Court of Appeals Eleventh Circuit
Rule 36-2. Unpublished Opinions

An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited or persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

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5 USC 7703 Judicial Review of Decisions of the Merit System Protection Board

(a)(1) Any employee or Applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 USC 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 USC 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 USC 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed with 30 days after the date the individual filing the case received notice of the judicially reviewable action under

such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in the subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(Added Pub. L. 95-454, title II, 205, Oct. 13, 1978, 92 Stat. 1143; amended Pub. L. 97-164, title L, 144, Apr. 2, 1982, 96 Stat. 45; Pub. L 101-12, 10, Apr. 10, 1989, 103 Stat. 35.)

The Constitution of the United States

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, that according to the rules of the common law.

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29 USC 631 Age Limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(Pub. L. 90-202, 12, Dec. 15, 1967. 81 Stat. 607; Pub. L. 95-256, 3(a), (b)(3), Apr. 6 1978, 92 Stat. 189, 190; 1978 Reorg. Plan No. 1, 2, eff. Jan 1, 1979, 43 FR 19807, 92 Stat. 3781; Pub L. 98-459, title VIII, 802(c)(1'), Oct. 9, 1984, 98 Stat. 1792; Pub. L. 99-272, title IX, 9201(b)(2). Apr. 7, 1986, 100 Stat. 171; Pub. L. 99-592. 2(c), 6(a). Oct. 31. 1986, 100 Stat. 3342, 3344; Pub. L. 101-239, title VI, 6202(b)(3)(C)(ii), Dec. 19, 1989, 103 Stat 2233.)

United States Court of Appeals Eleventh Circuit

Rule 34-3. Non-Argument Calendar

(a) The court maintains a two-calendar system for consideration and decision of appeals in the interest of efficient and appropriate use of judicial resources, control of the docket by the court, minimizing unnecessary expenditure of government funds, and lessening delay in decisions.

(b) When a panel of judges of the court unanimously determines, after an examination of the briefs and records, that an appeal of a party within one of the three categories of FRAP 34 (a)(2);

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been authoritatively determined; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process will not be significantly aided by oral argument; that appeal will be placed on the non-argument calendar for submission and decision without oral argument. If at any time before decision a judge on the nonargument panel concludes that oral argument is desired, that appeal will be transferred to the oral argument calendar. Except as provided in subparagbraph d of this rule, decisions without oral argument must be unanimous, and no dissenting or special concurring opinion may be filed; otherwise that appeal is transferred to the oral argument calendar.

(c) Any party may request in his or her brief that oral argument be heard, as provided in 11th Cir. R. 28-2(c).

(d) Pursuant to FRAP 34(f), if parties state that they do not desire oral argument or otherwise agree that an appeal shall be submitted on briefs, that appeal may be placed on the non-argument calendar even though it does not fall within one of the requirements of FRAP 34(a). The decision in that appeal need not be unanimous and a dissent or special concurrence may be filed.

(e) Panel of three judges are down to serve as screening panels to determine whether appeals should be placed on the non-argument calendar and to receive submission of and decide non-argument appeals. In appeals involving multiple parties, a screening panel may decide the appeals of fewer than all parties without oral and may schedule the appeal(s) of the remaining parties for oral argument.

(f) An oral argument panel, whether or not composed of only active judges, may be unanimous vote transfer to the non-argument calendar an appeal assigned to it for oral argument. (As amended eff. Dec. 1, 1998.)

UNITED STATES COURT OF APPEALS
Eleventh Circuit

DECISIONS WITHOUT PUBLISHED OPINIONS

The following cases have been decided without formal opinion prepared for publication in the permanent law reports:

Title	Docket No.	Date of Decision	Disposition	Appeal from and Citation (if reported)
• U.S. v Morgan-Atkinson	96-5452	12/27/99	Affirmed	S.D.Fla.
•U.S. v Rodz	97-5335	12/28/99	Affirmed	S.D.Fla.
• U.S. v Jefferson	98-2364	12/2999	Affirmed	M.D.Fla.
•Salb v Parks	98-3000	12/20/99	Affirmed	M.D.Fla.
•U.S. v. Ramos	98-3321	12/28/99	Affirmed	N.D.Fla.
•H. Meer Dental v. Patterson Dental	98-3546	12/29/99	Reversed in part, Vacated in Part	M.D.Fla.
•U.S. v. Jones	98-3756	12/29/99	Affirmed	M.D.Fla.
•U.S. v Spero	98-3772	12/29/99	Affirmed	M.D.Fla.

Title	Docket No.	Date of Decision	Disposition	Appeal from and Citation (if reported)
Norris v. Boeing North American	98-3846	12/20/99	Reversed in part, Vacated in part	M.D.Fla
Tegano v. VET	98-4346	12/20/99	Affirmed	S.D.Fla.
•Cooper v. Dept. of Corrections	98-4706	12/29/99	Affirmed	S.D.Fla.
Greggs v. Moore	98-5062	12/27/99	Affirmed	S.D.Fla.
Goodstal v. Lord & Taylor	98-5415	12/29/99	Affirmed	S.D.Fla.
•U.S. v. Clark	98-5670	12/30/99	Affirmed	S.D.Fla.
U.S. V. Phillips	98-5682	12/29/99	Affirmed	S.D.Fla.
•Trupel v. Scotti	98-5801	12/29/99	Affirmed	S.D.Fla.
•U.S. v. Allen	98-5865	12/27/99	Affirmed	S.D.Fla.
•U.S. v. Allen	98-5865	12/27/99	Affirmed	S.D.Fla.

Title	Docket No.	Date of Decision	Disposition	Appeal from and Citation (if reported)
•Sutton v. Apfel	98/5866	12/29/99	Reversed in part, Vacated in part	S.D.Fla.
Johnson v. American Postal U.S. Workers	98-5903	12/29/99	Affirmed	S.D.Fla.
~~U.S.~~ U.S. v. Motes	98-6381	12/27/99	Affirmed	S.D.Ala.
U.S. Cammon v. U.S.	98-6423	12/29/99	Affirmed	M.D.Ala.
• Jackson v. King	98-6992	12/28/99	Affirmed	M.D.Ala.
• U.S. v. Taylor	98-9098	12/29/99	Reversed in part, Vacated in part	M.D.Ga.
•Spires v. U.S.	98-9223	12/20/99	Affirmed	S.D.Ga.
• Veteto v. U.S.	98-9393	12/28/99	Reversed in part, Vacated in part	N.D.Ga.

Title	Docket No.	Date of Decision	Disposition	Appeal from and Citation (if reported)
• Edwards v. U.S.	98-9431	12/29/99	Reversed in part, Vacated in part	N.D.Ga.

United States Court of Appeals Eleventh Circuit

Rule 36-1. Affirmance without opinion.

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are clearly erroneous;

(b) The evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) Summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

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5 USC 8336(c)(2) and (f) - Immediate Retirement-(c)(2) - An employee is entitled to an annuity if the employee--

(A) was a law enforcement officer or firefighter employed by the Panama Canal Company or the Canal Zone Government at any time during the period beginning March 31, 1979, and ending September 30, 1979; and

(B) is separated from the service before January 1, 2000, after becoming 48 years of age and completing 18 years of service as a law enforcement officer or firefighter, or any combination of such service totaling at least 18 years.

(f) An employee who is separated from service after becoming 62 years of age and completing 5 years of service is entitled to an annuity.

United States Office of Personnel Management
OPF/EMF Access Unit
Post Office Box 18673
St. Louis, Missouri 63118
Mar 6 1997 In Reply Refer to:
Mr. Raymond Jackson
225 Conrad Street
Montgomery, AL 36110

Dear Mr. Jackson:

This responds to your Freedom of Information Act request received in our office February 24, 1997.

Your request was referred to our office because under the Privacy Act of 1974, the Assistant Director of the Office of Workforce Information is the system manager of the OPM/GOVT-1, General Personnel Records and OPM/GOVT-10, Employee Medical Files, systems of records that includes the official Personnel Folder (OPF) and Employee Medical Folder (EMF). He has delegated to this office the responsibility to release information in these systems of records to you. In response to your request, enclosed at Tab A is a copy of all records authorized for retention in your OPF and enclosed at Tab B is a copy of all records in your EMF.

Your OPF included documents during your employment with the U.S. Postal Service from March 26, 1973 to August 4, 1973. Since the Postal Reorganization Act of 1971, the U.S. Office of Personnel Management does not have legal jurisdiction over records created by that agency and we cannot release them to you. Therefore, we are forwarding your file and your request to the following address for U. S. Postal Service's action:

General Manager
Headquarters, Personnel Division
475 L'Enfant Plaza S.W.
Washington D.C. 20260-4261

During the review of your folders, we discovered documents that were either duplicates or inappropriate for long-term retention as prescribed by the U.S. Office of Personnel Management's rules and regulations. These documents have been removed and enclosed at Tab C for your disposition.

If we can be of further assistance to you regarding these records please do not hesitate to contact us at (314) 425-5743. We trust our actions are helpful to you.

Sincerely,

s/Pamela J. Carnes
Supervisory Personnel Assistant

Enclosures

cc: Ana Mazzi
Office of the Personnel Management
Office of the General Counsel

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225 Conrad Street
Montgomery, AL 36110-1303
May 8, 1997

Office of Federal Operations
Equal Employment Opportunity Commission (EEOC)
P. O. Box 19848
Washington, DC 20036

Notice of Petition to the EEOC From Merit Systems Protection Board (MSPB) Decision On A Mixed Case Appeal And Complaint Of Prohibited Race (Black), Sex (Male) And Age (62) Discrimination, In The Case of Raymond Jackson, 423-42-1287, Petitioner.

1. The MSPB's final decision, on petitioner's mixed appeal case and complaint-including prohibited race (Black), sex (male), and age (62) discrimination, dated March 11, 1997, and became final on April 15, 1997, is at exhibit 1.
2. By virtue of the authority at 29 CFR Ch.XIV (7-1-96 Edition) 1614.303 and 1614.304, 5 USCS 7702(b)(1), and 5 USCS 7703(b)(2), the petitioner petitions EEOC to consider MSPB's decision at exhibit 1.
3. The contents of the petition, as required by 29 CFR Ch.XIV (7-1-96 Edition) 1614.304(b), are set forth below:

(b)(1). The name and address of the petitioner.

a. Name: Raymond Jackson.

b. Address: 225 Conrad Street, Montgomery, AL 36110-1303.

(b)(2). The name and address of the petitioner's representative, if any.

a. Name: None.

b. Address: Not applicable.

(b)(3). A statement of reasons why the decision of MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race, color, religion, sex, national origin, age or handicap.

a. MSPB's analysis and Findings state that "Appellant also raised the issues of sex and race discrimination and whistle-blowing. However, since he has presented no facts in support of those claims, I reject them out of hand as claims with respect to which appellant has not even made out a prima facie case" (see exhibit 1, Analysis and Findings, last paragraph).

1. MSPB's decision, i.e., The Agency's reconsideration decision is affirmed, at exhibit 1, page 4, is incorrect, in whole or part, for reasons set forth below:

a. The record shows that petitioner raised the prohibited race (Black) discrimination issues, a clear violation of prohibited personnel practice 5 USC 2302(b)(1)(A) and a violation of section 717 of Civil Rights Act of 1964 (42 USC 633(a)(c)), which is stated in his MSPB appeal package, dated 11/23/96, at exhibit #5 (Page 2, paragraph 1b, and 1(c); page 3, paragraph 1(a) and 3(a)); #6 (page 1, paragraphs I(C) and II(C) and page 2, paragraph III(c); #7 (page 1, paragraphs 1(e); page 2, paragraph 2(e) and 3(e))), #11 (paragraphs #1(a), 2(a) and 3(a); #12 (paragraphs 1(b), 1(c), 1(d), 1(e), 1(f), 1(g), 2 and 3) and #13 (plus 1 attached exhibit). OPM and MSPB failure to investigate constitutes a harmful error.

b. The record shows that petitioner raised the prohibited sex (male) discrimination issue, a clear violation of prohibited personnel practice 5 USC 2302(b)(1)(A) and (C); section 6(d) of the fair Labor Standards Act of 1938 (29 USC.206(d)) and section 717 of Civil Rights Act of 1964 (42 USC 633(a)(c)), which is stated in his MSPB Appeal Package, dated 11/23/96, at exhibits #5 (page 2, paragraphs 1(b) and 1(c); page 3, paragraphs 1(a) and 3(a)); #6 (page 1, paragraphs I(d) and II(d); page 2, paragraph III(c)); #7 (page 1, paragraph 1(e); page 2, paragraphs 2(e) and 3(e); #11(paragraphs 1(a), 2(a) and 3(a)); #12 (paragraphs 1(b), 1(c), 1(d), 1(e), 1(f), 1(g), 2 and 3)) and #13 (plus 1 attached exhibit). OPM and MSPB failure to investigate constitutes a harmful error.

c. The record shows that petitioner raised the prohibited age (62) discrimination issue, a clear violation of 5 USC 2301(b)(2) Merit System principle, 5 USC 2302(b)(1)(B) prohibited personnel practice, and sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 USC 631, 633(a), in his MSPB Appeal Package, dated 11/23/96, at exhibits #5 (page 2, paragraph 1(c); page 3, paragraph 1(a); pages 3 and 4, paragraph 3(a)); #6 (page 1, paragraphs I(e), II(e) and III(d)); #7 (page 1, paragraph 1(e); page 2, paragraphs 2(e) and 3(e) and #11 (paragraphs 1(a), 2(a) and 3(a)). MSPB's final decision, exhibit 1, shows that the Administrative Law Judge (ALJ) erred and failed to decide the prohibited age (62) discrimination issue in 120 days after the appeal was filed, a violation of 5 CFR II (1/1/96 Edition) 1201.156(a). Therefore, MSPB's final decision, exhibit 1, is incorrect, in whole, with respect to the prohibited age (62) discrimination issue and constitutes a harmful error.

d. The record shows that petitioner raised the whistle blowing activity issue, a clear violation of 5 USC 2301(b)(9)(A) and (B) Merit System principles, Public Law 95-454; 5 USC 2302(b)(8)(A)(i) and (ii)), (b)(9)(A), and (b)(11) prohibited personnel practices, Public Law 95-454), which is stated in his MSPB Appeal package, dated 11/23/96, at Part VII-whistle blowing activity of the MSPB Appeal package, exhibits #16, 17, 18 and 19. OPM and MSPB failure to investigate constitutes a harmful error.

e. The record shows that personnel actions appealable to the Board, which were based, in whole or in part, on prohibited discrimination of race (Black), sex (male) and age (62) are: (1) OPM's Action (Decision) #1-to recompute annuitant's gross monthly rate under Public Law 97-253 (see exhibit 6, annuitant's letter to OPM, dated 2/28/96). This is a type personnel action, 5 CFR Ch. II (1/1/96 Edition) paragraph 1209.4(a)(9) - concerning pay and benefits (also 5 USC 2302(a)((2)(A)(ix)) and restoration of pay and benefits (5 USC 2302(a)(2)(vi)) (see petitioner's MSPB Appeal package, Block 12, part III, exhibit 4); (2) OPM's Action (Decision) #2 - not to correct annuitant's gross monthly pay rate based on the evidence at exhibits 4 and 5 of Exhibit 6, annuitant's letter to OPM, dated 2/28/96, based on documented understated creditable service of 203 days. This is a type personnel action 5 CFR Ch. II (1/1/96 Edition) paragraph (1209.4(a)(9)) - concerning pay and benefits (also 5 USC 2302(a)(2)(A)(ix) and restoration of pay and benefits (5 USC 2302(a)(2)(A)(vi)) (see petitioner's MSPB appeal package, Block 12, part III, exhibit 4, dated 11/23/96); (3) OPM's Action (Decision) #3 - not to compute and pay annuitant's back pay (i.e., from 4/1/88, date of retirement, to date of claim settlement), based on evidence at Exhibits 4 and 5 of Exhibit 6 - Petitioner's letter to OPM, dated 2/28/96, which is based on documented understated creditable service of 203 days and correction of service compensation date (SCD) from 8/2/56 to 1/7/56. This is a type personnel action, 5 CFR Ch. II (1/1/96 Edition) paragraph 1209.4(a)(9) - concerning pay and benefits (also 5 USC 2302(a)(2)(A)(ix) and restoration of pay and benefits (5 USC

2302(a)(2)(A)(vi) (see petitioner's MSPB Appeal package, Block 12, part III, exhibit 4, dated 11/23/96) and (4) OPM's Excessive/More than six (6) month delay (i.e., from 2/28/96, date of petitioner's letter request for reconsideration to OPM (Exhibit 5, annuitant's MSPB Appeal package, dated 11/23/96 to 10/21/96, date of corrected copy of OPM's reply to annuitant's request for reconsideration of OPM's three (3) decisions) on Annuitant's request for reconsideration (see exhibit 14, petitioner's MSPB appeal package, dated 11/23/96). This is a type personnel action, 5 CFR Ch. II (1/1/96 Edition) paragraph 1209.4(a)(9) - concerning pay and benefits (also 5 USC 2302(a)(2)(A)(ix)) and restoration of pay and benefits (5 USC 2302(a)(2)(A)(vi) (see exhibit 14 plus attached exhibit, dated 9/16/96). OPM and MSPB willful failure to investigate prohibited race (Black) and sex (male) discrimination (29 CFR Ch. XIV 97/1/96 Edition) 1614.108(a) and (e)), properly and legally act upon the personnel actions, violations of prohibited personnel practices and merit system principles raised in this appeal constitute prohibited race (Black), sex (male), and age (62) discrimination in the distribution of retirement benefits. Therefore, MSPB's final decision, at exhibit 1, with regard to the prohibited race (Black), sex (male) and age (62) discrimination issues, is INCORRECT, IN WHOLE, and constitutes a harmful error to petitioner.

f. The appeal record shows that, on December 16, 1996, appellant filed a motion for an order compelling discovery, with Merit Systems Protection Board and that the administrative Law Judge (ALJ) subsequently denied the motion. The ALJ not only erred, abused her discretion, abused her power and perpetrated prohibited race (Black), sex (male, and age (62) discrimination upon petitioner by arbitrarily, capriciously and willfully denying the motion for an order compelling discovery for production of relevant documents and information authorized by 5 CFR 1201.72(a), (b) and (c), but denied appellant due process of law. Therefore, MSPB's final decision at exhibit 1 is INCORRECT, IN WHOLE, with regard to the prohibited discrimination issues of race (Black), sex (male) and age (62), and constitutes a harmful error to petitioner.

g. The appeal record shows that, on September 16, 1996, petitioner filed two formal complaints with OPM (see exhibits #12 and #18 (exhibit #12)), petitioner's MSPB Appeal package, dated 11/23/96)) for prohibited race (Black) and sex (male) discrimination perpetrated against petitioner in the distribution of retirement benefits. The record shows that OPM knowingly, willfully, arbitrarily and capriciously failed to investigate prohibited discrimination complaints for race (Black) and sex (male), as required by 5 USC 2302(c), Public Law 95-454; 4 CFR Ch.II (1/1/96) 1201.163(c); 29 CFR Part 1613, section 1615.108(a) and (e), and 5 CFR Part 772, denying petitioner due process of law. Therefore, MSPB"s final decision at exhibit 1 is INCORRECT, IN WHOLE, with regard to the prohibited discrimination issues of race (black) and sex (male), and constitutes a harmful error to petitioner.

h. The appeal record shows that the Administrative Law Judge (ALJ) closed the record on February 3, 1997. On January 9, 1997, petitioner filed a Freedom of Information Act (FOIA) Request with Associate Director for Retirement and Insurance, Office of Personnel Management (OPM), 1900 E Street, NW, Washington, DC 20415 (see exhibit 2). The appeal record and shipping record shows that the FOIA request was signed for at OPM at 1230 p.m. by Williams on January 15, 1997. Therefore, the 10 day response period is January 15, 1997 to January 29, 1997, as set by 5 USC 552(a)(6)(A)(i), September 6, 1996, Public Law 89-554, 80 Stat. 378, of the Freedom of Information Act. OPM failed to comply with requirements of parts II, III, IV and V of petitioner's FOIA Request. Part I - all OPM records on Raymond Jackson, 423-42-1287/CSA 3059/121, were received February 22, 1997 (see exhibit 3, dated February 18, 1997), and received March 8, 1997 (see exhibit 4, dated March 6, 1997), which are 19 and 35 days, respectively, after the Administrative Law Judge closed the case file; 24 and 38 days, respectively, after the 10 day response deadline expired, willfully denying petitioner due process of law, violating 5 USC 552(a)(6)(A)(i) and PL 89-554, 80 Stat. 378, wrongfully withholding petitioner's documents, perpetrating prohibited race (Black), sex (male) and age (54) discrimination upon petitioner. Therefore, for reasons cited, MSPB's final decision at exhibit 1 is INCORRECT, IN WHOLE, with regard to the prohibited discrimination issues of race (Black), sex (male) and age (54), and constitutes a harmful error to petitioner.

i. The wrongfully withheld petitioner's documents at exhibit 4 (p.3, Headquarters, U.S. Army Aviation Systems Command's Request to Regularize Unauthorized Early Retirement of Raymond Jackson, an Operations Research Analyst, GS 1515-12, dated 28 July 1988; P.4, Office of Personnel Management's letter granting an exception to regularize the Retirement of Mr. Jackson, dated August 31, 1988; P. 5, Department of the Army, U.S. Total Army Personnel Agency (provisional)'s letter, Subject: Voluntary Early Retirement Authority - Mr. Raymond Jackson, dated September 7, 1988; P. 6, Cdr, USAMC's 1st endorsement, Subject: Voluntary Early Retirement authority - Mr. Raymond Jackson, dated October 18, 1988, and P.7, Notification of personnel action, dated 3/31/88) which were acquired under a 1/9/97 FOIA request, exhibit 2, shows that: (1) Headquarters, US Army Aviation systems Command PERPETRATED prohibited race (Black), sex (male) and age (54) discrimination, PERJURY AND LIED to procure approval of their "Request to Regularize Unauthorized Early Retirement of Raymond Jackson by stating that "If the request to regularize the retirement is not approved, Mr. Jackson, who has subsequently moved to a distant state, must be returned to duty which will cause extreme hardship to the individual due to circumstances beyond his control" (see exhibit 4, p. 3 , paragraph 3). The phrase" will cause extreme hardship to the individual due to circumstances beyond his control" is A LIE AND PERJURY due to: a) No representative from Headquarters, U.S. Army Aviation Systems command discussed this matter with Mr. Raymond Jackson, b) It would not have caused any hardship on Mr. Raymond Jackson to return from Montgomery, Alabama to St. Louis, Missouri, to work and c) Mr. Raymond Jackson would have returned to his job in St. Louis had he been notified to return by the Civilian Personnel Office at Headquarters, U.S. Army Aviation Systems Command. The decision to regularize the unauthorized

Early Retirement of Mr. Raymond Jackson, is INVALID AND ILLEGAL because it was granted on the basis of a LIE AND PERJURY. It also constitutes a denial of due process of law, and prohibited race (Black), sex (male) and age (54) discrimination. THEREFORE, Headquarters, U.S. Army Aviation Systems Command retroactively owes petitioner all pay, benefits and promotions for GS-1515-12, Operations Research Analyst, from 4/1/88 to date of this claim settlement; and (2) Cdr, USAMC 1st endorsement, Subject: Voluntary Early Retirement authority - Mr. Raymond Jackson (exhibit 4, page 6, paragraph 2) directed that "please ensure that a copy of the OPM letter regularizing Mr. Jackson's retirement is placed in his Official Personnel Folder, right side, before it is sent to the National Records Center and that the original letter is sent to Mr. Jackson." Commander, U.S. Army Aviation Systems Command willfully ABUSED HIS DISCRETION, ABUSED HIS POWER, perpetrated prohibited race (Black), sex (male) and age (54) discrimination upon petitioner, and PERPETRATED DENIAL OF DUE PROCESS OF LAW by FAILING TO SEND THE ORIGINAL LETTER to Mr. Raymond Jackson, as ordered by Cdr, USAMC. Clearly, HQ AVSCOM, and MSPB's Administrative Law Judge (by denying petitioner's Motion to compel discovery as shown in the record) perpetrated prohibited race (Black), sex (male) and age (62) discrimination upon petitioner, and constitutes a harmful error to petitioner.. Therefore, MSPB's final decision at exhibit 1 is INCORRECT, IN WHOLE, with regard to the prohibited discrimination issues of race (Black), sex (male) and age (54) discrimination issues. Consequently, petitioner is entitled to retroactive relief, from 4/1/88 to settlement date, including pay, benefits and promotions, and therefore, seeks the retroactive relief.

j. MSPB's final decision, exhibit 1, arbitrarily, capriciously, willfully and knowingly failed to notify the appellant of his right to petition the Board's final decision to the Equal Employment Opportunity Commission to consider the Board's decision or to file a civil action in an appropriate United State District Court, as required by 5 CFR Ch. II (1/1/96 Edition) 1201.157, perpetrating prohibited race (Black), sex (male) and age

(63) discrimination upon appellant and denying appellant due process of law. Therefore, MSPB's final decision at exhibit 1, is IN CORRECT, IN WHOLE, with regard to the prohibited race (Black), sex (male) and age (63) discrimination issues, and constitutes a harmful error to petitioner.

k. Petitioner's appeal record shows not only that OPM willfully failed to INVESTIGATE the issues of prohibited race (Black), sex (male) and age (62) discrimination raised in the appeal within 120 days, as required by 5 CFR Ch. II (1/1/96 Edition) 1201.163 (c)(1) and (c)(2), 29 CFR part 1613, Ch. XIV (7/1/96 edition) 1614.108(a) and (e)), and 5 CFR part 772, but MSPB FAILED to impose the sanctions provided in 5 CFR 1201.43 if an agency failed to timely complete and file the results of such an investigation. This is just another example of how OPM and MSPB conspired and perpetrated prohibited race (Black), sex (male) and age (62) discrimination upon petitioner. Therefore, MSPB's final decision, at exhibit 1, is INCORRECT, IN WHOLE, with regard to the prohibited race (Black), sex (male) and age (62) discrimination issues, and constitutes a harmful error to petitioner.

l. The appeal record shows that MSPB's Administrative Law Judge (ALJ) erred and perpetrated prohibited race (Black), sex (male) and age (63) discrimination upon the petitioner by willfully failing to decide the issue of prohibited age (62) discrimination, which was raised in petitioner's MSPB appeal package, dated 11/23/96, within 120 days after the appeal is filed as required 5 CFR Ch.11 (1/1/96 Edition) 1201.156 (a) and (b), 1201.163(c)(3), 29 CFR part 1613, Ch XIV (7/1/96 edition), 1614.108(a) and (e) or 5 CFR part 772. Therefore, MSPB's final decision, at exhibit 1, is INCORRECT, IN WHOLE, with regard to the prohibited age (62) discrimination issue, and constitutes a harmful error to petitioner.

m. The appeal record shows that MSPB's Administrative Law Judge (ALJ) erred and perpetrated prohibited race (Black), sex (male) and age (62) discrimination upon petitioner by not requiring OPM's representative/OPM to provide the content of OPM's response to petitioner's appeal and to comply with 5 CFR Ch. II (1/1/96 Edition) 1201.25(b) - A statement identifying the agency action taken against the appellant and stating reasons for taking the action (i.e., on the issues appealed by petitioner) and 1201.25(e) - any other documents or responses requested by the Board and to comply with ALJ's written order to both OPM and petitioner. Therefore, MSPB's final decision, at exhibit 1, is INCORRECT, IN WHOLE, with regard to the prohibited race (Black), sex (male) and age (62) discrimination issue, and constitutes a harmful error to petitioner.

n. The appeal record shows that petitioner timely filed "Request for a Stay of Personnel Action (i.e., 5 USC 2302 (a)(2)(A)(ix) - A decision concerning pay and benefits (i.e., Retirement Benefits)) for petitioner from OPM's Reconsideration Decision (dated 2/28/96) on November 20, 1996. OPM failed to provide MSPB the agency response to the stay, as authorized by 5 CFR Ch. II (1/1/96 Edition) 1209.9(c). The MSPB's Administrative Law Judge (ALJ) abused her discretion, erred and perpetrated prohibited race (Black), sex (male) and age (62) on petitioner by: (1) arbitrarily and capriciously failing to hold a hearing on the stay request, as authorized by 5 CFR Ch. II (1/1/96 Edition) 1209.10(a); (2) by not ruling on the stay request within 10 days (5 CFR Ch. II (1/1/96 Edition) 1209.10(b)(1)) and not setting forth the factual and legal bases for the decision (5 CFR Ch. II (1/1/96 Edition) 1209.10(b)(2)). Therefore, MSPB's final decision, at exhibit 1, is incorrect, in whole, with regard to the prohibited race (Black), sex (male) and age (62) discrimination issues, and constitutes a harmful error to petitioner.

o. The initial and final decision, exhibit 1, of MSPB's Administrative Law Judge (ALJ) willfully failed to comply with 5 CFR Ch.II (1/1/96 Edition) 1201.111(b) to include b(1) Findings of Fact and Conclusions of law upon all the material issues of fact and law presented on the record, including appealed personnel actions, violations of prohibited personnel practices, perpetration of prohibited race (Black), sex (male) and age (62) discrimination in distribution of retirement benefits; b(2) - set forth the reasons or bases for these findings and conclusions; b(3) - an order making final disposition of the case, including appropriate relief (note: by virtue of OPM's decision, dated 10/21/96, exhibit 3, sentence #5, MSPB's appeal package, date 11/23/96, which states that "we have reviewed your claim in accordance with the provisions of Public Law 97-253 and Section 831.2107 of Title 5, Code of Federal Regulations, and have reversed our initial decision". Therefore, the petitioner prevailed. It is further noted that OPM reduced petitioner's monthly pay rate from $1967.00 to $1096, under provision of P. L. 97-253 and OPM HAVE NO AUTHORITY TO REVIEW THAT DECISION UNDER PROVISIONS OF 5 CFR 831.2107, in violation of P.L. 97-253, Sec. 307(a). Therefore, the review under provisions of 5 CFR 831.2107 constitutes a harmful error to petitioner.

Consequently, petitioner is entitled to all full and appropriate relief IMMEDIATELY; (b)(4) - A statement, if the appellant is the prevailing party, as to whether interim relief is provided effective upon the date of the decision, pending the outcome of any petition for review filed by another party under subpart C of this part. (Note: Clearly, petitioner is the PREVAILING party).

OPM reversed its decision on Decision #1 to reduce petitioner's monthly pay rate, from $1967.00 to $1096.00, but willfully failed to restore the monthly pay rate to $1967.00 and act on the other two (2) personnel actions - concerning pay and benefits raised in the Reconsideration Request, dated 2/28/96) and 5 CFR Ch. II (1/1/96 Edition) 1201.111(b)(6) - a statement of any further process available, including, as appropriate a petition for enforcement under 5 CFR 1201.182, including petition to the Equal Employment Opportunity Commission (EEOC). This is a harmful error to petitioner. Clearly, OPM and MSPB have willfully perpetrated prohibited race (Black), sex (male) and age (62) discrimination upon petitioner in the distribution of retirement benefits, bu failing to include that statement in exhibit 1. Therefore, MSPB's final decision, at exhibit 1, is INCORRECT, IN WHOLE, with regard to the prohibited race (Black), sex (male), and age (62) discrimination issues, and constitutes a harmful error to petitioner.

p. The appeal record (i.e., exhibit 18 (exhibit 14), sentence #8, OPM's decision of 10/21/96, MSPB appeal package, dated 10/21/96) states that "we have reviewed your claim in accordance with the provisions of Public Law 97-253 and section 831.2107 of Title 5, Code of Federal Regulations, and have reversed our initial decision". Clearly, Petitioner HAS PREVAILED IN THIS CASE. OPM used the authority of P. 97-253 to reduce petitioner's monthly pay rate from $1967 to $1096.00. Clearly, IT IS ILLEGAL FOR OPM TO USE AUTHORITY OF 5 CFR 831.2107 to review a decision based on P.L. 97-253 and which violates P.L. 97-253, Sec. 307(a). The MSPB's Administrative Law Judge (ALJ) not only erred in affirming OPM's decision to not restore appellant's monthly pay rate, from $1096 to $1967.00, in which 5 CFR 831.2107 takes precedence over P.L. 97-253, but the ALJ perpetrated prohibited race (Black), sex (male) and age (63) discrimination upon petitioner. Therefore, MSPB's final decision exhibit 1, is INCORRECT IN WHOLE, with regard to prohibited sex (male), race (Black) and age (63) discrimination issues, but constitutes a harmful error to petitioner.

q. The appeal record shows that appellant filed two (2) prohibited race (Black) and sex (male) discrimination complaints on 16 September 1996 with OPM (see exhibits #12 and #18 (exhibit 12) MSPB appeal package, dated 11/23/96). Appellant's appeal record shows that he raised prohibited race (Black), sex (male) and age (62) discrimination issues, and prohibited personnel practices violations, resulting in prohibited race (Black), sex (male) and age (62) discrimination with MSPB in his appeal package, but both OPM and MSPB failed to INVESTIGATE the complaints, as required by 29 CFR Ch. XIV (7/1/96 Edition) 1614.108(a), Investigation of Complaints and failed to complete its investigation within 180 of the date of filing of an individual complaint (29 CFR Ch. XIV 7/1/96 Edition) 1614.108(e). Therefore, MSPB's final decision, exhibit 1, is INCORRECT, IN WHOLE, with regard to prohibited race (Black), sex (male) and age (62) discrimination issues, and constitutes a harmful error to petitioner.

r. The record shows and OPM decision document (Exhibit 5, sentence #5, dated 10/21/96) states that, "We have reviewed your claim in accordance with the provisions of

Public Law 97-253 and Section 831.2107 of Title 5, Code of Federal Regulations, and have reversed our initial decision." By virtue of OPM's REVERSAL, PETITIONER HAS PREVAILED IN THIS MATTER (see First Commodity Traders, Inc. v. Heinold Commodities, Inc., C.A. Ill., 766 F.2d 1007, 1015.). It is a well-established fact that provisions of Public Law 97-253, Sec. 307(a), take precedence over Section 831.2107 of Title 5, Code of Federal Regulations. The Administrative Law Judge (ALJ) erred and perpetrated prohibited race (Black), sex (male) and age (63) discrimination upon petitioner, in reversing the PRECEDENCE between P.L. 97-253 Sec. 307(a) and 5 CFR 831.2107, which constitutes a harmful error to petitioner. PETITIONER, AS THE PREVAILING PARTY, is entitled to INTERIM RELIEF, UNDER PROVISIONS OF 5 CFR Ch II (1/1/96 Edition) 1201.111(c), which states that "under 5 USC 7701(b)(2), if the appellant is the prevailing party, the initial decision will provide appropriate interim relief to the appellant effective upon the date of the initial decision and remaining in effect until the date of the final order of the Board on any petition for review...including providing pay and benefits. The Administrative Law Judge (ALJ) erred and perpetrated prohibited race (Black), sex (male) and age (63) discrimination upon appellant by NOT INCLUDING INTERIM RELIEF IN MSPB'S final decision at exhibit 1. Therefore, MSPB's final decision, exhibit 1, is INCORRECT, IN WHOLE, with regard to prohibited race (Black), sex (male) and age (63) discrimination issues, and constitutes harmful error to petitioner.

s. On January 23, 1997, appellant mailed via USPS Express Mail "Appellant's Burden of Proof for Issues of Appellant's Appeal, dated November 23, 1996" to Merit Systems Protection Board, Atlanta Regional Office. That document, which was signed for by William Fuller of MSPB at 1130 on 1/28/97, and appellant's MSPB Appeal package dated 11/23/96, show that appellant has met his burden of proof, by a preponderance of the evidence (i.e., the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue - 5 CFR Ch. II (1/1/96 Edition) 1201.56(c)(2)), with respect to: (i) Issues of jurisdiction; (ii) The timeliness of the appeal; and (iii) affirmative defenses, as required by 5 CFR Ch. II (1/1/96 Edition) 1201.56(a)(2), provides, again, below: i. Issues of Jurisdiction: (1) to restore appellant's gross monthly pay rate to $1967.00, effective 3/16/96, and not recompute annuitant's gross monthly rate under Public Law 97-253 (see Request for Reconsideration, dated 2/28/96, MSPB's Appeal package, dated 11/23/96; (2) to correct 203 days understatement of appellant's total creditable service as authorized by 5 USC 8332 and other CFRs and correct service compensation date (SCD) to "1/7/56"; (3) to compute and pay annuitant's for 203 days of understated total creditable service, effective 4/1/88 for (2) and (3) see Request for Reconsideration, dated 2/28/96, MSPB's Appeal package, dated 11/23/96), as authorized by 5 USC 8332 and other CFRs; (4) OPM's perpetrating prohibited race (Black), and sex (male) discrimination in the distribution of retirement benefits on 9/16/96 (see Exhibit 12, MSPB appeal package, dated 11/23/96); (5) On 10/21/96, OPM perpetrated prohibited race (Black), sex (male) and age (62) discrimination in distribution of retirements (see exhibit 11, paragraph 1(a), MSPB appeal package, dated 11/23/96); (6) On 10/21/96, OPM perpetrated prohibited race (Black), sex (male) and age (62) discrimination in the distribution of retirement benefits (see Exhibit 11, paragraph 1a, MSPB appeal package, dated 11/23/96); (7) on 10/21/96 OPM perpetrated prohibited race (black), sex (male) and age (63) discrimination in the distribution of retirement benefits - by failing to correct annuitant's understated creditable service of 203 days, effective 4/1/88 (see Exhibit 11, paragraph 2(a), MSPB appeal package) in the distribution of retirement benefits; (7) On 10/21/96 OPM perpetrated race (Black), sex (male) and age (62) discrimination in the distribution of retirement benefits - by willfully failing to compute and pay annuitant's back pay, effective 4/1/88, for 203 days of understated creditable service (see MSPB appeal package, dated 11/23/96, exhibit 11, paragraph 3(a)); (8) OPM perpetrated prohibited race (Black), sex (male) and age (54) discrimination upon petitioner to procure approval of a 3/31/88 unauthorized voluntary early retirement of petitioner by willfully perpetrating perjury, lying and refusing to send petitioner a copy of the letter of approval, as directed by higher authority (see exhibit 4, pages 3 to 6); (9) whistle blowing activity - on 9/16/96 petitioner filed a prohibited race (Black) and sex (male) discrimination complaint with U.S. Civil Rights Commission, more than a month before OPM 10/21/96 decision (see Exhibit 18 (exhibit #9 OPM Appeal Package dated 11/23/96)) and received U.S. Civil Rights Commissioner's reply on October 7, 1996 (see exhibit 18 (exhibit 11), MSPB appeal package dated 11./23/96), 2 weeks before OPM 10/21/96 decision. Clearly, this is whistle blowing activity concerning prohibited race (Black) and sex (male) discrimination; (ii) The Timeliness of the Appeal: The appeal was timely filed on 11/23/96, and (iii) Affirmative defenses - Appellant set forth affirmative defenses below (5 CFR Ch II (1/1/96 Edition) 1201.56(b)): a) Harmful error. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error (5 CFR Ch. 11 (1/1/96 Edition) 1201.56(c)(3)): 1) The agency perpetrated harmful error in the application of the agency's procedures in arriving at its decision as set forth below: a) the agency used the authority of Public Law 97-253 to reduce appellant's monthly pay rate from $1967.00 to $1096.00, which caused appellant to lose $12,194.00 ($1967-$1096) x 14 months from 3/16/96 to 5/15/97, which caused substantial harm or prejudice to petitioner's rights; b) the agency reversed its decision on 10/21/96, wrongfully applied 5 CFR 831.2107, in violation of P.L. 97-253, Sec. 307(a), and retain petitioner's back pay from 3/16/96, which caused substantial harm or prejudice to his rights; (c) OPM conspired and perpetrated prohibited race (Black) and sex (male) and age (54) discrimination upon appellant to procure approval of his 3/31/88 unauthorized voluntary Early Retirement by willfully perpetrating perjury, lying and refusing to send petitioner a copy of the letter of approval of his unauthorized voluntary early retirement, which wrongfully and illegally denied petitioner all pay, benefits and promotions from 3/31/88 to present; and (d) remainder of harmful errors are at exhibits 7 and 8 of MSPB appeal package, dated 11/23/96, excluding those identified elsewhere in this document.. (2) The agency's decision, exhibit 5, is based on prohibited personnel practice described in 5 USC, 2302(b), below: (a) OPM's Decision #1: 5 USC 2302(b)(1)(A), 5 USC 2302(b)(1)(C), 5 USC 2302(b)(8)(A), 5 USC 2302(b)(1)(A), 5 USC 2302(b)(1)(B) and 5 USC 2302(b)(1)(A) (see MSPB appeal package, dated 11/23/96, exhibit 5 - page 2, paragraphs 1(b) and (1(c)) & (b)(1)(A) (see MSPB appeal package, dated 11/23/96, exhibit 5 - page 2, paragraphs 1(b) and 1(c)); (b) OPM Decision #2: 5 USC 2302(b)(8)(A)(ii), 5 USC 2302(b)(8)(A)(i), 5 USC 2302(b)(1)(A), 5 USC 2302(b)(1)(B), 5 USC 2302(b)(1)(C) and 5 USC 2302(b)(9)(A) (see exhibit 5 - page 3, paragraph 1(a), MSPB appeal package, dated 11/23/96) and OPM Decision #3: 5 USC 2302(b)(8)(A)(ii), 5 USC 2302(b)(8)(A)(i), 5 USC 2302(b)(1)(A), 5 USC 2302(b)(1)(B), 5 USC 2302(b)(1)(C) and 5 USC 2302(b)(9) (see exhibit 5 - page 4, paragraph 3a, MSPB appeal package, dated 11/23/96); with the law, as described below: OPM Decision #1 violated Public Law 97-253, Sec. 307(a) plus 38 other laws cited at exhibit 9, paragraphs 1(a) and (b) of MSPB appeal package, dated 11/23/96' OPM Decision #2 violated 5 USC 8332 plus 17 other laws cited at paragraph 2(a); exhibit 9, MSPB appeal package, dated 11/23/96; and Decision #3 violated 5 USC 8332 plus 17 other laws cited at paragraph 3(a), exhibit 9 - page 2, MSPB appeal package dated 11/23/96.

OPM arbitrarily, capriciously and willfully failed to comply with paragraph 1, materials required to be tabbed and filed, MSPB Schedule 831 - Requirements for Agency File of MSPB's order, Docket #AT-0831-97-0206-I-1, dated December 3, 1996, which requires the agency to file "a narrative response to the appeal and all material issues raised by appellant", required by 5 CFR 1201.25. OPM not only failed to comply with MSPB's order and 5 CFR 1201.25 by not complying, but OPM willfully perpetrated HARMFUL ERROR, Denial of due process, causing substantial harm or prejudice to petitioner's rights wrongfully and illegally tampering with the outcome of this case, perpetrating race (Black), sex (male) and age (62) discrimination upon petitioner. For appellant's affirmative defenses previously cited 5 CFR Ch. II (1-1-96 Edition) 1201.56(b), under 5 USC 7701(c)(2), THE BOARD IS

REQUIRED TO OVERTURN THE ACTION OF THE AGENCY. Clearly, OPM and MSPB have perpetrated race (Black), sex (male) and age (63) discrimination upon petitioner. For previously cited reasons in this paragraph, OPM decision, exhibit 1, is INCORRECT, IN WHOLE, with regard to prohibited race (Black), sex (male) and age (63) discrimination issues, and constitutes harmful error to petitioners

t. The MSPB's final order alleges that "However, since he has presented no facts in support of those claims, I reject them out of hand as claims with respect to which appellant has not even made out a prima facie case". (see exhibit 1, p. 4, lines 24 through 27). THE ALLEGATION IS OUTRAGEOUSLY, MALICIOUSLY AND WILLFULLY FALSE FOR REASONS CITED BELOW:

1. The appeal record shows that OPM and MSPB WILLFULLY FAILED TO INVESTIGATE ANY OF THE PROHIBITED RACE (Black), sex (male) and age (54, 62, 63) discrimination complaints raised on petitioner's MSPB appeal package, dated 11/23/96, AS REQUIRED BY 29 CFR Ch. XIV (7/1/96 Edition) 1614.108(a) and 1614.108(e) and subsequently. If OPM AND MSPB HAD CONDUCTED STATUTORY INVESTIGATIONS, AS WERE THEIR DUTIES, THE FACTS THEY ARE CHARGED WITH DEVELOPING BY STATUTORY INVESTIGATIONS WOULD BE AVAILABLE TO THE PETITIONER AND THE GOVERNMENT. Clearly, OPM AND MSPB WERE NEGLIGENT IN PERFORMANCE OF THEIR DUTIES, and it constitutes harmful error to petitioner.

2. The appeal record shows that petitioner filed his appeal on "Merit Systems Protection Board Appeal Form-Append I to Part 1201", 5 CFR Ch. II (1/1/96 edition), part 1201, Appendix I, on 11/23/96. Therefore, completing that Form at Part 1202, Appendix I, constitutes compliance with 5 CFR Ch. II (1/1/96 edition) 1201.153(a), contents of appeal, in accordance with 5 CFR Ch. II (1/1/96 Edition) 1201.153(b). Consequently, MSPB allegation of "no prima facie case" is without "a LEGAL BASIS" and "GROUNDLESS", and constitutes harmful error to petitioner.

3. Black's Law Dictionary defines prima facie as "a fact presumed to be true unless disproved by some evidence to the contrary" (see State ex rel. Herbert v. Whims 68 Ohio App. 39, 38 N.E. 2d 596, 599, 22 O.O. 110) The appeal record shows that OPM not only failed to comply with MSPB's order, dated 12/3/96, directing OPM to serve on appellant and MSPB "a narrative response to the appeal and all material issues raised by appeal", as required by 5 CFR 1201.25, BUT OPM HAS NOT PROVIDED "ANY EVIDENCE TO THE CONTRARY" to DISPROVE ANY FACTS OR EVIDENCE IN THE APPEAL RECORD. THEREFORE, THE ADMINISTRATIVE LAW JUDGE (ALJ), allegations that this is not "a prima facie case" is not supported by either "substantial evidence" or "a preponderance of evidence" in the appeal record, and constitutes harmful error to petitioner.

4. Black's Law Dictionary defines prima facie case as (a) "such as will prevail until contradicted and overcome by other evidence. Pacific Telephone & Telegraph Co. V. Wallace, 158 Or. 210,75 p.2d 942, 947. The appeal record shows that OPM and MSPB have not presented any evidence that contradicted and overcame any other evidence presented by appellant. Therefore, the ALJ's claim that there is no prima facie case" is not supported by either substantial evidence or a preponderance of evidence; and (b) Courts use "prima facie" to mean not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it". Husbands v. Com. Of Pa., D.C. Pa., 395 F. Supp. 1107, 1139. The appeal record shows that OMB and MSPB, the defendants, failed to produce no evidence to rebut plaintiff's evidence. Consequently, plaintiff's evidence compels the conclusions plaintiffs seeks. Therefore, MSPB's final decision, exhibit 1, is incorrect, in whole, with regard to the prohibited race (Black), sex (male) and age (54, 62, 63), discrimination issues and constitutes harmful error to petitioner.

(b)(4). A copy of the decision issued by MSPB: See Appendix 54 (b)(5). The signature of the petitioner:

s/Raymond Jackson
RAYMOND JACKSON

Department of the Army
Headquarters, US Army Aviation Systems Command
4300 Goodfellow Boulevard, St. Louis, MO 63120-1798
Reply to Attention of AMSAV-RS28 JUL 1988
MEMORANDUM FOR: COMMANDER, U.S. ARMY
MATERIEL COMMAND, ATTN: AMCPE-CE-S
(MIKE EDWARDS), 5001 EISENHOWER AVENUE,
ALEXANDRIA, VA 22333-0001

SUBJECT: Request to Regularize Unauthorized Early Retirement

1. Approval is requested to regularize the early out retirement of an individual who occupied a position subject to direct hire authority.

2. On the last day of the AMC early out authority, 31 Mar 88, Mr. Raymond Jackson, an Operations Research Analyst, GS-1515-12, in the U.S. Army Aviation Systems Command, Directorate for Systems and Cost Analysis was inadvertently allowed to retire. Although his position was not on a special hire rate and he did meet the service (31 years) and age (54) requirements for the early out, he did occupy the GS-1515 series which has been designated as an authorized direct hire series by the St. Louis Area Office of Personnel Management. The application was submitted on a day of exceptional work load as applications were being submitted, others were being withdrawn, while additional retirement counseling was being provided as requested to employees still considering the early retirement option.

3. If the request to regularize the retirement is not approved, Mr. Jackson, who has subsequently moved to a distant state, must be returned to duty which will cause extreme hardship to the individual due to circumstances beyond his control.

4. The point of contact for this action is Mr. Don C. Boswell, Chief, Technical Services Division, AV 693-2155 or 314-263-2155.

s/DIANE OTTOLINI

Civilian Personnel Officer

United States Office of Personnel Management
Washington, D.C. 20415-0001
OCT 21 1996
CSA 3 059 121

Raymond Jackson
225 Conrad Street
Montgomery, AL 36110

Dear Mr. Jackson:

This is in reply to your February 28, 1996, request for reconsideration of the initial decision of the Office of Personnel Management (OPM). This decision found that your Civil Service annuity had to be recomputed to eliminate all credit for post-1956 military service because you had not made a timely deposit for purposes of having this service included in your annuity upon attaining eligibility for Social Security Administration (SSA) benefit at age 62. SSA confirms your entitlement to this benefit based on the service involved: Whether you applied for or received those benefits at that time is immaterial to the determination to adjust your annuity. We have reviewed your claim in accordance with the provisions of Public Law 97-253 and Section 831.2107 of title 5, Code of Federal Regulations, and have reversed our initial decision.

We find that you should be allowed an opportunity to make a deposit for your post 1956 military service based on your claim of administrative error. This letter extends the time-frame for making such a deposit, requiring that your deposit be submitted within 30 days of the date you receive a bill. Your annuity will continue to be reduced until your election is made. The following procedures apply:

1. Obtain a statement of your estimated earnings attributable to post-1956 military service by submitting a copy of the enclosed form

(Attachment 5 to FPM Letter 831-77) to the military pay center specified below:

Commander
Air Force Accounting and Finance Center/AJCAA
Denver, CO 80279

and

Commanding Officer
Navy Finance Center
Attn: 43C
Anthony J. Celebrezze Federal Building
Cleveland, OH 44199

2. Upon receipt of the certified earnings statement send this form, along with a completed copy of the enclosed SF 2803, Application to Make Deposit to the following address.

   Office of Personnel Management
   Retirement Operation Center
   Post Office Box 45 STOP: R. Schaeffer
   Boyers, PA 16020

   A copy of this letter should accompany your request to make a deposit.

3. You will be billed by OPM for the amount of deposit due (7% of post 1956 military earnings plus any applicable interest). Payment must be in one lump-sum within 30 days of receipt of the bill. OPM will credit your service upon receipt of the completed payment.

Please note, since you previously elected the Alternative Form of Annuity (AFA) entitling you to a reduced annuity with a lump-sum payment(s) of the contributions amount, you may elect to have this military deposit "deemed" paid. This will prevent requiring you to pay the deposit stated above, which if paid would then be immediately repaid to you under the AFA provisions. If elected, the amount deemed paid will not be paid to you as a lump-sum payment, but will increase the monthly annuity reduction (for the AFA) retroactive to the commencing date of your annuity. This retroactive reduction will result in any annuity overpayment from the commencing date of annuity to the date your annuity is actually reduced for this deposit election. More information on this election will follow when you are billed.

This is OPM's final decision in this matter. If you have any questions about the status of your case, you may call me at (202) 606-0553.

Sincerely,

s/John Zimmerman
Benefits Specialist
Disability, Reconsideration and Appeals Division

Enclosures

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5 USC 8334(j)(1)(A). Deductions, Contributions and Deposits. (j)(1)(A) Except as provided in subparagraph (B), each employee or member who has performed military service before the date of the separation on which the entitlement to any annuity under this subchapter is based may pay, in accordance with such regulations as the Office shall issue, to the agency by which the employee is employed, or in the case of a member or a Congressional employee, to the Secretary of the Senate or the Clerk of the House of Representatives; as appropriate, an amount equal to 7 percent of the amount of the basic pay paid under section 204 of Title 37 to the employee or members for each period of military service after December 1956. The amount of such payments shall be based on such evidence of basic pay for military service as the employee or member may provide, or if the Office determines sufficient evidence has not been so provided to adequately determine basic pay for military service, such payment shall be based upon estimates of such basic pay provided to the Office under paragraph (4).

Public Law 95-454, 5 USC 2302(c) - Prohibited Personnel Practices

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect, thereof, shall be similarly responsible within the limits of the delegation.

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5 CFR Ch. II (1/1/00 Edition) 1614.303

1414.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.

(a) *Who may file*. Individuals who have received a final decision from the MSPB on a mixed case appeal or on the appeal of a final decision on a mixed case complaint under 5 CFR part 1201, subpart E and 5 USC 7702 may petition EEOC to consider that decision. The EEOC will not accept appeals from MSPB dismissals without prejudice.

(b) *Method of filing*. Filing shall be made by certified mail, return receipt requested, to the Office of Federal Operations, Equal Employment Opportunity Commission, P. O. Box 19848, Washington, DC 20036.

(c) *Time to file*. A petition must be filed with the Commission either within 30 days of receipt of the final decision of the MSPB or within 30 days of when the decision of a MSPB field office becomes final.

(d) *Service*. The petition for review must be served upon all individuals and parties on the MSPB's service list by certified mail on or before the filing with the Commission, and the Clerk of the MSPB, 1120 Vermont Ave., NW., Washington, DC 20419, and the petitioner must certify as to the date and method of service.

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5 CFR 1614.304. Contents of Petition

(a) *Form*. Petitions must be written or typed, but may use any format including a simple letter format. Petitioners are encouraged to use EEOC Form 573, Notice of Appeal/Petition.

(b) *Contents*. Petitions must contain the following:

(1) The name and address of the petitioner;

(2) The name and address of the petitioner's representative, if any;

(3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race, color, religion, sex, national origin, age or handicap;

(4) A copy of the decision issued by the MSPB; and

(5) The signature of the petitioner or representative, if any.

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5 CFR.1201.156 Time for Processing Appeals Involving Allegations of Discrimination

(a) *Issue raised in appeal*. When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after the appeal is filed.

(b) *Issue not raised in appeal*. When an appellant has not alleged prohibited discrimination in the appeal, but has raised the issue later in the proceeding, the judge will decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

(c) *Discrimination issue remanded to agency*. When the judge remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the agency completes its action and returns the case to the Board.

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5 CFR 1201.157 Notice of Right to Judicial Review

Any final decision of the Board under 5 USC 7702 will notify the appellant of his or her right, within 30 days after receiving the Board's final decision, to petition the Equal Employment Opportunity Commission to consider the Board's decision, or to file a civil action in an appropriate United States district court. If an appellant elects to waive the discrimination issue, an appeal may be filed with the United States Court of Appeals for the Federal Circuit as stated in 1201.120 of this part.

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5 USC 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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29 CFR 1601.28(d) CIVIL RIGHTS 42 foll. USCA 2000e-4. Notices of right-to-sue for charges against Government respondents.

In all cases where the respondent is a government, governmental agency, or a political subdivision, the Commission will issue the notice of right to sue when there has been a dismissal of a charge. The notice of right to sue will be issued in accordance with 29 CFR 1601.28(e).

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42 USC 2000e-5 (f)(4) and f(5). Civil action by Person Aggrieved-Designation of Judge to Hear and Determine Case; and Assignment of Case for Hearing.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Rule 56(a), (b), (c) and (d). Summary Judgment - Title 28, Appendix - Rules of Civil Procedure

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and administrations on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If no motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Public Law 90-202; 81 Stat. 602, Age Discrimination In Employment Act of 1967, Section 2-Statement of Findings and Purpose

STATEMENT OF FINDINGS AND PURPOSE

Sec. 2 (a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Public Law 90-202; 81 Stat. 602, Age Discrimination In Employment Act of 1967, Section 4(a) - Prohibition of Age

Discrimination

Prohibition of Age Discrimination

Sec. 4 (a) It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

Public Law 90-202; 81 Stat. 602, Age Discrimination In Employment Act of 1967, Section 9&b) and (c) — Enforcement

Recordkeeping, Investigation, and Enforcement

Sec. 7 (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 USC 209 and 211).

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217), and subsection 9c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC

216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purpose of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purpose of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

The Constitution of the United States - Amendment I

Religious establishment prohibited. Freedom of speech, of press, right to assemble and to petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.